United Nations A/HRC/35/32

General Assembly

Distr.: General
24 April 2017

Original: English

Human Rights Council
Thirty-fifth session
6-23 June 2017
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Note by the Secretariat

The present report provides reflections on the challenges and opportunities for small and medium-sized enterprises in the implementation of the Guiding Principles on Business and Human Rights. It highlights the role of these enterprises in global supply chains and their impact on human rights, and the roles of Governments, business associations and international organizations in providing essential support to these enterprises in their implementation of the Guiding Principles. The aim of the report is to serve as a starting point for discussions on how these enterprises can scale up implementation of the Guiding Principles.

GE.17-06514(E)

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I. Introduction

A. Background, aims and outline

1. In the present report, the Working Group on the issue of human rights and transnational business enterprises and other business enterprises examines the importance for small and medium-sized enterprises of implementing the Guiding Principles on Business and Human Rights, with a particular focus on the challenges and opportunities for such efforts.

2. The report is prepared as part of a wider effort of the Working Group to promote implementation of the Guiding Principles and to clarify and elaborate on practical implications. It is intended to represent an initial assessment of an important but complex subject, in the hope of prompting further discussions among stakeholders on more refined and nuanced ways of supporting and strengthening the ability that small and medium-sized enterprises have in meeting their responsibilities to implement the Guiding Principles.

3. Section I includes an assessment of contextual issues, including the definition of small and medium-sized enterprises, the global economic environment in which they operate and their human rights responsibilities. Section II includes an overview of existing tools and guidance, and the various capacity-building initiatives. It also includes a review of the roles of specific stakeholders, including business initiatives and associations, trade unions, international organizations and Governments, and examples of good practices. Section III includes conclusions and recommendations on how to strengthen the role of these enterprises in preventing and addressing adverse human rights impacts, in line with the Guiding Principles.

B. Basic characteristics of small and medium-sized enterprises

4. The boundaries between small, medium and large enterprises are fluid and differ between nations. There are no consistent naming conventions: some countries differentiate between small and medium, or introduce the concept of a micro-enterprise, while others do not. However, some key variables — such as size, legal status, sector, resources, employment, turnover, capital investment and balance sheet totals — are considered in most definitions. Most commonly, small and medium-sized enterprises are defined as a business with fewer than 250 employees.[1]

5. The differing visions concerning small and medium-sized enterprises reflect how difficult it is to engage in a coherent manner with such a diverse business community. Aside from certain definitions, there is more that divides these enterprises than unites them, including geography, sector, operating contexts, development levels and governance. It therefore makes little sense to identify a "typical" enterprise or a "typical" human rights footprint in order to determine how business and human rights interact.

6. Small and medium-sized enterprises are of paramount importance to a country's economy, as they contribute to economic growth, foster innovation and economic diversification and create jobs, all of which have a positive impact on the livelihoods of individuals.[2] The International Labour Organization (ILO) has estimated that there are between 420 and 510 million such enterprises globally (excluding the many micro-enterprises that comprise fewer than 10 employees). Of those, an estimated 80-95 per cent are in low- and middle-income countries. In countries of the Organization for Economic Cooperation and Development (OECD), small and medium-sized enterprises are estimated

[1] For examples of different definitions, see International Labour Organization, *Small and medium-sized enterprises and decent and productive employment creation* (Geneva, 2015). See also https://unstats.un.org/unsd/industry/meetings/eg2005/AC105-22.pdf and https://stats.oecd.org/glossary/detail.asp?ID=3123.

[2] See www.oecd.org/cfe/smes/2090740.pdf.

to account for over 95 per cent of all enterprises.[3] Furthermore, ILO estimates that, globally, they provide two thirds of all employment.[4]

7. While there is a wealth of research on how small and medium-sized enterprises contribute to economic development and employment generation, ILO has indicated that data is lacking on the quality of employment in them. The information available indicates that working conditions in these enterprises are generally worse than in larger business enterprises.[5] At the same time, they are often an important source of employment for groups who are particularly vulnerable to social and economic deprivation, including women, older persons and less-skilled workers.

8. Despite the discrimination women continue to face in all regions, it is estimated that in emerging markets around one third of formal small and medium-sized enterprises are fully or partially owned by women.[6] Gender-specific constraints, including discriminatory laws and practices concerning women's economic rights and legal capacity, also contribute to the fact that a higher proportion of women-run small and medium-sized enterprises are not formally registered.[7]

9. ILO estimates that, worldwide, a significant number of small and medium-sized enterprises operate in the informal economy. In some developing countries, there are more informal enterprises than formal. For example, it is estimated that, in India, there are 17 times more informal, unregistered enterprises than formal.[8] While the number of informal business enterprises vary significantly between countries, ILO estimates that the informal economy accounts for between half and three quarters of all non-agricultural employment in developing countries.[9] Moreover, data from 47 low- and medium-income countries shows that, in general, more men work in informal enterprises than women, with the exception of sub-Saharan Africa, where the percentage of women employed in the informal sector is generally higher.[10]

10. The high number of small and medium-sized enterprises in the informal economy poses specific challenges for the implementation of the Guiding Principles. ILO has highlighted that the informal economy encompasses the informal sector and informal employment and is defined as all economic activities by workers and economic units that are, in law or in practice, not covered or insufficiently covered by formal arrangements.[11] There have been attempts to identify the linkages between the formal and informal economics, including the argument that there is some degree of interaction between both types of economy. There is a linkage between the informal economy and a heightened risk of adverse human rights impacts because of the way the informal economy operates outside of legal and regulatory frameworks and therefore more easily escapes human rights and labour law mechanisms of oversight and social protection. Workers in the informal sector do not have legal and social protection through their work and are generally not unionized, and their working conditions more easily escape the oversight of labour inspectorates. As informal businesses are often diffused and unorganized, it is more difficult and more expensive for authorities to work with these businesses to help implement standards and to track and enforce implementation.

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[3] See OECD Policy Brief "Small and Medium-sized Enterprises: Local Strength, Global Reach" (Paris, 2000). Available from www.oecd.org/cfe/leed/1918307.pdf.

[4] See http://ilo.org/global/topics/employment-promotion/small-enterprises/lang--en/index.htm.

[5] See ILO (2005), *Report IV: Small and medium-sized enterprises and decent and productive employment creation*, pp. vi, 23.

[6] See International Finance Corporation, *Strengthening Access to Finance for Women-Owned SMEs in Developing Countries* (Washington, D.C., 2011), p. 6.

[7] Ibid, p. 7.

[8] See ILO, *Report IV* (footnote 5 above), p. 5.

[9] See ILO, *Women and Men in the Informal Economy: A Statistical Picture* (2013), p. 8. Available from www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_234413.pdf.

[10] Ibid, p. 15.

[11] See http://www.ilo.org/global/topics/wages/minimum-wages/beneficiaries/WCMS_436492/lang--en/index.htm.

11. A significant feature of small and medium-sized enterprises, arising principally from their smaller size, is what has been termed their "resource poverty".[12] That is, a poverty not only of financial resources but also in terms of areas such as knowledge, expertise and trained or qualified staff. Millions of such enterprises lack access to financial services; between 45 and 55 per cent of these that are formally registered do not have access to formal institutional loans or overdrafts, despite a need for such facilities and the fact that these enterprises provide 45 per cent of total employment in the developing world.[13] This handicap has been compounded by the 2008 financial crisis and its aftermath. Such financial poverty means that many enterprises enter the market with only a single product and without the finance to diversify their offerings, even if this were considered to be strategically desirable.[14] Furthermore, the salary of an owner-manager represents a much larger portion of revenue than in a larger company, meaning that there may be insufficient resources to pay for additional professional staff with a mandate to ensure compliance with the responsibility to respect human rights.

12. Given their lack of financial capital, small and medium-sized enterprises turn increasingly to human capital, which is a fundamental element to their success. However, despite this, these enterprises often experience poor staff planning, multifunctional management, high employee turnover, low productivity, difficulties in recruiting quality staff and an inability to adequately test and train employees in advance. In particular, bureaucracy and regulation remain a burden for them, in both developed and developing countries, while reducing costs and expenses is their top business ambition. Finally, they may not be able to afford to pay for the kind of professional services, including accounting and reporting, that new initiatives may require.[15]

13. In November 2016, the International Organization of Employers and ILO produced a report on their joint survey of small and medium-sized enterprises and human rights.[16] According to their findings, the most cited challenge for these enterprises included a lack of resources (46 per cent of respondents), followed by uncertainty about responsibilities in the light of government duties (36 per cent), the poor enforcement of national law in practice (36 per cent), the difficulty of operating in situations where fundamental economic, ecological and social standards were not part of national law (31 per cent) and the difficulty of translating policy commitments into relevant operational procedures (29 per cent).

14. The limited resources of small and medium-sized enterprises and the difficulties they face regarding identification and their predominantly informal character have led some enterprise owners and academics to claim that regulations regarding corporate social responsibility — and by implication human rights — would be counterproductive,[17] in particular owing to the added bureaucracy that would divert resources from actually improving behaviour.[18] However, there is evidence to the contrary in the way such enterprises respond to regulatory standards, including those concerning environmental sustainability, anti-corruption, human trafficking and health and safety. The lessons of how small and medium-sized enterprises implement such compliance standards can be very useful for the implementation of the Guiding Principles.

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[12] J. Welsh and J. White, "A Small Business Is Not a Little Big Business", *Harvard Business Review*, (July 1981). Available from https://hbr.org/1981/07/a-small-business-is-not-a-little-big-business.

[13] See Global Partnership for Financial Inclusion, "Report to the Leaders" (2011), p. 4. Available from www.oecd.org/g20/summits/cannes/Global%20Partnership%20for%20Financial%20Inclusion%20Report%20to%20Leaders.pdf.

[14] D.J. Storey, *Entrepreneurship and the New Firm* (London, 1982).

[15] See "A Small Business Is Not a Little Big Business" (footnote 12 above).

[16] Available from www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_535220.pdf.

[17] See Baden, Harwood and Woodward, "The effect of buyer pressure on suppliers in SMEs to demonstrate CSR practices: An added incentive or counterproductive?" *European Management Journal*, No. 27, p. 429; and Yves Fassin, "SMEs and the fallacy of formalizing CSR" *Business Ethics: A European Review*, Vol. 17, Iss. 4, p. 364.

[18] See European Commission, "Opportunity and Responsibility: How to help more small businesses to integrate social and environmental issues into what they do (2007), p. 4. Available from www.een-portugal.pt/info/RSO/Documents/Opportunity%20and%20Responsibility.pdf.

C. Human rights responsibilities of small and medium-sized enterprises

15. According to Guiding Principle 14, "the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts".

16. This means that all business enterprises, from small and medium-sized enterprises to large multinational enterprises, are expected to exercise human rights due diligence (as described in Guiding Principles 17 to 21), to avoid causing or contributing to adverse human rights impacts, and to take steps to mitigate and address any such adverse impact that is directly linked to their operations, including by cooperating in their remediation.

17. Small and medium-sized enterprises may have less capacity and more informal processes but their impact upon human rights can be just as significant as transnational corporations. At the same time, the steps needed to prevent and address such human rights impacts could be less complex for a small company than a large transnational corporation. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), the approaches needed to embed respect for human rights in a smaller enterprise's operations can often mirror the lesser complexity of its operations. However, size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks. The severity of its actual and potential human rights impact will be the more significant factor. For instance, a small company of fewer than 10 staff that trades minerals or metals from an area characterized by conflict and human rights abuses linked to mining has a very high human rights risk profile. Its policies and processes for ensuring that it is not involved in such abuses will need to be proportionate to that risk.[19]

18. Simple steps can be taken by small and medium-sized enterprises to respect human rights, and the Guiding Principles set out the path to follow. First, business enterprises will be expected to identify and assess any actual or potential adverse human rights impacts with which they may be involved, either through their own activities or as a result of their business relationships. Such enterprises should utilize the Guiding Principles, in particular pillar 2 (Principles 16 to 22) to assess their human rights impacts. In doing so, they may need to consult directly with potentially affected stakeholders and draw on external human rights resources and expertise. On the basis of an assessment of risks, these enterprises should take action to prevent and mitigate any adverse human rights impacts (Principle 19), track the effectiveness of such action (Principle 20) and be prepared to communicate externally how they address their human rights impacts, or report formally on this, in cases where their operations pose risks of severe human rights impacts (Principle 21). Where small and medium-sized enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation (Principle 22), including though internal, industry or multi-stakeholder grievance mechanisms (Principles 29 to 31), in alignment with the effectiveness criteria of the Guiding Principles for non-judicial grievance mechanisms.[20]

19. For a long time, small and medium-sized enterprises have been involved in debates, initiatives and activities concerning corporate social responsibility. For example, a 2002 report[21] found that half of such enterprises in Europe had been involved in external socially responsible activities, including some related to compliance with human rights standards.

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[19] See OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (New York and Geneva, 2012), p. 20. Available from www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

[20] According to Principle 31, for a grievance mechanism to be credible it has to be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue.

[21] See European Commission, *European SMEs and social and environmental responsibility* (2002), p. 7. Available from http://bookshop.europa.eu/en/european-smes-and-social-and-environmental-responsibility-pbNB1401004/.

However, these enterprises were not noticeably active in the processes leading up to the publication of the Guiding Principles in 2011. This is perhaps not surprising, as the primary focus of international efforts to develop business and human rights standards has been on transnational corporations. Examples of this are the unsuccessful attempt to develop a United Nations code of conduct, the original OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/Sub.2/2003/12/Rev.2).

20. The low level of engagement of small and medium-sized enterprises in the international business and human rights conversation is not only due to the focus on transnational corporations in international policy discussions, but also a reflection of the fact that, in most jurisdictions, the government regulatory and policy departments and agencies that are oriented towards these enterprises either lack the awareness of international human rights standards or view them as irrelevant to smaller enterprises.

II. Implementing the Guiding Principles by small and medium-sized enterprises

A. Opportunities for small and medium-sized enterprises

1. Comparative advantages of small and medium-sized enterprises

21. Small and medium-sized enterprises are more labour-intensive than large business enterprises and often have a greater capacity to absorb labour (including unskilled labour),[22] which can help to lift families and communities out of poverty. Small businesses are usually locally owned and controlled and can therefore strengthen the extended family, as well as other social systems and cultural traditions. Family-owned business enterprises in particular have been found to exhibit strong ethical and philanthropic approaches,[23] which may provide a platform for a wider strategy to respect human rights. Some studies have found size within a company to have a positive effect on responsible engagement,[24] while others have contradicted this[25] or claimed a "U-shape" relationship between size and engagement.[26]

22. There are aspects of small and medium-sized enterprises that may lead to outcomes that are beneficial to human rights. For example, small firms play an important economic and social role in general, and the development and growth of small firms may also help redress social and economic exclusion. Given that they are often deeply embedded in the community context, such enterprises may have a greater understanding of local cultural and political contexts and more links with civil society,[27] which may in turn increase their socially responsible practices.[28] They can also be at the forefront of the struggle against

[22] See H. Rwigema and P. Karungu, "SMME Development in Johannesburg's Southern Metropolitan Local Council: An assessment", *Development Southern Africa*, Vol. 16, Iss. 1 (1999), pp. 107 and 111.

[23] See United Nations Industrial Development Organization (UNIDO), *Corporate Social Responsibility: Implications for Small and Medium Enterprises in Developing Countries* (Vienna, 2002) p. ix. Available from www.unido.org/fileadmin/import/userfiles/puffk/corporatesocialresponsibility.pdf.

[24] See *European SMEs and social and environmental responsibility* (footnote 21 above).

[25] See "Effect of buyer pressure on suppliers in SMEs" (footnote 17 above).

[26] See K. Udayasankar, "Corporate Social Responsibility and Firm Size", *Journal of Business Ethics*, Vol. 83, p. 167 (2008).

[27] See "Effect of buyer pressure on suppliers in SMEs" (footnote 17 above), p. 261.

[28] See Association of Chartered Certified Accountants, "Small business: a global agenda" (2010). Available from www.accaglobal.com/content/dam/acca/global/PDF-technical/small-business/pol-afb-sbaga.pdf.

disadvantage[29] and offer an opportunity to enter the workforce to groups that have been traditionally excluded from employment in large businesses in some States (e.g. women and ethnic minorities). For these groups, self-employment and ownership of small businesses can be a means to engage in economic life. In South Africa, small and medium-sized enterprises have provided critical avenues for non-whites to own businesses, after having been historically discouraged from doing so.[30]

23. Small and medium-sized enterprises are more flexible than their larger counterparts, enabling them to respond better to changes and disturbances in the social environment. Most also have a shorter-term outlook and strategies that are intuitive and opportunistic, which can be both a strength and a weakness. Within local systems of production, such enterprises can often be more flexible and responsive to customer needs than large firms. They can pool resources and share the costs of training, research and marketing with other firms of a similar size and industry.[31] Their products and use of local technology may be more likely to satisfy the needs of poor people than the products of large enterprises using foreign technology,[32] and they can adapt new technologies to gain an edge over larger business enterprises. This flexibility may also facilitate adaptation to new expectations and requirements to respect human rights in line with the Guiding Principles. Small and medium-sized enterprises are potentially "quicker on and off their feet", which allows them to be better placed than major corporate entities to take advantage of the fact that society and the media revere qualities such as honesty, integrity and the ability to say sorry.[33]

2. Need for tailored guidance

24. The dynamic nature of small and medium-sized enterprises may, however, result in their limited strategic capacity, especially over the long term.[34] Furthermore, their limited market share means that they may be heavily reliant on a few customers, or in some cases just one. This dynamic nature also results in their constant creation and destruction: in 2002, it was estimated that 460 million adults around the world were involved in entrepreneurial activity, which could result in the creation of 100 million new businesses.[35] However, in the Philippines, for example, for every 10 people currently starting or running a new business, there are 7 who have discontinued one in the past year.[36] Half of European businesses started in 2001 had ceased operation by 2006.[37]

25. Despite the fact that small and medium-sized enterprises are of vital importance for the promotion of economic growth, job creation and the mitigation of poverty, particularly

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[29] See Association of Chartered Certified Accountants, "Beyond the Equality Bill: embedding equality and diversity in SMEs" (2010). Available from www.accaglobal.com/content/dam/acca/global/PDF-technical/small-business/tech-tp-beb.pdf.

[30] See "SMME Development" (footnote 22 above), p. 111.

[31] See http://www.oecd.org/cfe/leed/1918307.pdf.

[32] See "SMME Development" (footnote 22 above), p. 111.

[33] See N. Sarbutts, "Can SMEs 'do' CSR? A practitioner's view of the ways small- and medium-sized enterprises are able to manage reputation through corporate social responsibility", *Journal of Communication Management*, Vol. 7 (2003), pp. 340 and 346. Available from www.emeraldinsight.com/doi/abs/10.1108/13632540310807476.

[34] See L. Eakin, F. Raiszadeh and H. Hunt, "Just-in-time: a timely opportunity for small manufacturers", *Industrial Management* (January 1990), pp. 16-18.

[35] See P.D. Reynolds et al, "Global Entrepreneurship Monitor: 2002 Executive Report" (Babson College, Ewing Marion Kauffman Foundation, London Business School, 2002). Available from www.eshri.se/gemglobalreport_2002.pdf.

[36] See D. Kelley, S. Singer and M. Herrington, *Global Entrepreneurship Monitor: 2015/16 Global Report* (Entrepreneurship Research Association, 2016). Available to download from www.gemconsortium.org/report.

[37] See H. Schrör, "Business Demography: Employment and Survival" (Eurostat, Statistics in Focus 70/2009), p. 4. Available from http://edz.bib.uni-mannheim.de/www-edz/pdf/statinf/09/KS-SF-09-070-EN.pdf.

in less developed countries,[38] the increased risk associated with their operation also means that very few micro-enterprises ever grow beyond 10 or more employees.[39] One argument for this is attributed to the owners unwillingness to pursue the expansion of their micro-enterprise.

26. Consequently, any guidance on business and human rights targeted at small and medium-sized enterprises must take into account the increased risks of them failing in terms of the content of the guidance and the directions it gives, and must also be aware that the target audience of the guidance will be in constant flux and that owner-managers who understand the importance of business and human rights often will be replaced by new entrepreneurs with new businesses. This means that collective tools and solutions may be most beneficial, so that these enterprises and entrepreneurs have access to shared knowledge and tools that can be deployed readily by new market entrants.

27. Small and medium-sized enterprises are generally perceived as being at the bottom of the supply and value chain. The reality is, however, more nuanced. For example, a significant proportion of them engage in exporting and importing, particularly in more developed countries, with a minority engaging in foreign direct investment.[40] They have links at the top, middle and bottom of the supply and value chain. They are, in effect, the nerves that bind the business fabric together. Tailored guidance should also reflect this reality and bear in mind the roles of other actors and stakeholders in this system.

3. Business case for respecting human rights

28. Alongside the moral and legal case for businesses to respect human rights, there is also an economic one. When businesses analyse their potential markets, they inevitably do so in terms of the risks and opportunities, which, in the case of human rights, can be both. The concept and process of due diligence, including environmental and social impact assessments are ways of determining which decisions to make and why. If a company establishes human rights and sustainability as a baseline for its investments, then it is far less likely to be open to the risk of bad publicity and to investors reacting negatively to their products and services. Therefore, it is vital that time and resources be allocated to the argument for business and human rights and that training, particularly for senior managers, be dedicated to the businesses operating in their host countries and to operating oversees.

29. The rise of the Internet has accelerated the need for more small and medium-sized enterprises to look inward and to assess their own cases for developing human rights frameworks. Customers can exert massive pressure on a company to change the way it does business. Targeted human rights-centred campaigns can have both negative and positive impacts on the goods and services of small and medium-sized enterprises and greatly increase or reduce their market share.

30. The Federation of Small Businesses has suggested that concerns about additional bureaucracy can be countered by highlighting the "business case" for improving human rights as an effective way of encouraging small and medium-sized enterprises to act responsibly and fulfil their responsibility to respect human rights.[41] The European Commission concurs with that approach: in its guidance to such enterprises on implementing the Guiding Principles, it explains how effective implementation of the

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[38] See C.M. Rogerson, "Growing the SMME Manufacturing Economy of South Africa: Evidence from Gauteng Province", *Journal of Contemporary African Studies*, Vol. 19, Iss. 2 (2001), pp. 267-291. Available from www.tandfonline.com/doi/abs/10.1080/02589000120066498.

[39] See D.C. Mead and C. Liedholm, "The dynamics of micro and small enterprises in developing countries", *World Development*, Vol. 26, Iss. 1 (1998), pp. 61-74. Available from http://www.sciencedirect.com/science/article/pii/S0305750X97100109.

[40] See Edinburgh Group, "Growing the global economy through SMEs" (2013), p. 13. Available from www.conta-conta.ro/miscellaneous/863_miscellaneous_contabilitate_files%20863_.pdf.

[41] See Federation of Small Businesses, *Social and Environmental Responsibility and the Small Business Owner* (London, 2008). Available from www.fsb.org.uk/LegacySitePath/policy/assets/CSR%20Dec%202008.pdf.

Guiding Principles may lead to increased revenue for business.[42] Similarly, in a report on the value of sustainability and human rights reporting, the Global Reporting Initiative identified, inter alia, the importance of improving management systems and the opportunity to identify an enterprise's strengths and weaknesses, in addition to attracting, motivating and retaining good quality employees.[43] It also identified external factors, including the enhancement of reputation, attracting funding and achieving competitive advantage and leadership.[44] However, the idea of the "business case" cannot stand alone. First, there may be situations where abusing human rights could have short-term economic gains, which should of course not serve to justify such abuse. Second, enhancing business performance is not necessarily a main motivator for small and medium-sized enterprises to engage in responsible behaviour. However, evidence from the traditional corporate social responsibility field suggests that the extent of engagement in efforts to respect human rights will be influenced by commercial factors, with advantages and disadvantages analysed in the same way as any other commercial decision.[45]

B. Small and medium-sized enterprises in supply chains

31. Small and medium-sized enterprises play an integral role in global supply chains and in the economic development of virtually all countries. Economic policies and strategies often focus on these enterprises rather than transnational corporations because of their importance for employment generation. In a 2013 report, the Fung Global Institute, Nanyang Technological University and World Trade Organization noted how, both in developing and high-income countries, these enterprises were important actors in global supply chains and how their integration into global value chains had been pursued as an important strategy of economic development.[46]

32. Transnational and multinational enterprises also have a part to play in their interaction with small and medium-sized enterprises in global supply chains and implementation of the Guiding Principles. Many large business enterprises, for example, have a supplier code of conduct[47] that must be followed by all small and medium-sized enterprises with which they conduct business.

33. Small and medium-sized enterprises do not operate in a vacuum, and many of them will maintain relationships with larger businesses that may be in a position to assist smaller business enterprises with their business and human rights responsibilities. Indeed, larger business enterprises are expected to help their smaller suppliers to respect human rights as an integral part of their own human rights due diligence in order to prevent adverse human rights impacts directly linked to their business operations through their supply chains or business relationships.

34. Small and medium-sized enterprises are in some cases offered training on human rights and legal compliance through capacity-building programmes, including initiatives that aim to provide a working grievance system, use technology to detect and eliminate

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[42] European Commission, "My Business and Human Rights: A Guide to Human Rights for Small and Medium-Sized Enterprises" (2012). Available to download from http://ec.europa.eu/DocsRoom/documents/10375/attachments/1/translations/en/renditions/native.

[43] See Global Reporting Initiative, "Ready to Report?: Introducing sustainability reporting for SMEs" (2014), p. 6. Available from www.globalreporting.org/resourcelibrary/Ready-to-Report-SME-booklet-online.pdf.

[44] Ibid., p. 7.

[45] See P. Castka et al, "How Can SMEs effectively implement the CSR agenda? A UK case study perspective", *Corporate Social Responsibility and Environmental Management*, Vol. 11, Iss. 3 (2004), pp. 140-141.

[46] See Fung Global Institute, Nanyang Technological University and World Trade Organization, *Global value chains in a changing world* (Geneva, 2013). Available from www.wto.org/english/res_e/booksp_e/aid4tradeglobalvalue13_e.pdf.

[47] See, for example, "Samsung Electronics Supplier Code of Conduct", available from www.samsung.com/us/aboutsamsung/for_partners/downloads/samsung-supplier-code-of-conduct-guide-ver-2-1.pdf.

child labour, establish fair working hours, strengthen monitoring fair work and pay and provide multiple training and consultation programmes for suppliers and new employees.

35. One survey on small and medium-sized enterprises showed some of the ways they are connected to large businesses. There may be connections through formal supply chain relationships, as well as more informal or general links with larger business enterprises. A large proportion of such enterprises (77 per cent) who responded to the survey considered that they were part of a supply chain, with the largest supply relationship contributing between one quarter and one half of the their total turnover in 30 per cent of cases.[48] Their role in the supply chain tended to harness their ability to provide a niche product or service that larger businesses were unable to provide themselves or could not provide as cheaply. Of the businesses who considered that they were part of a supply chain, two thirds provided a standardized product or service, half provided a bespoke product service and one in five provided some form of research and development.

36. Almost half of small and medium-sized enterprises form non-supply chain relationships with larger business enterprises, primarily to become more established in their marketplace and with the hope of gaining additional business. This networking is crucial for such enterprises in sectors dominated by large businesses, which can spur on smaller enterprises in the supply chain to improve technological and human capital.[49] In the above-mentioned survey, one quarter of small and medium-sized enterprises were involved in research and development partnerships with larger business enterprises, while 15 per cent were in more formal joint ventures with large enterprises. A further 15 per cent received some mentoring from a larger business as the latter sought to enhance productivity through their supply chain. Links with larger businesses may provide opportunities for small and medium-sized enterprises to alleviate some of the problems that their resource poverty may cause for the business and human rights agenda. With existing supply-chain relationships already in place, and a culture of mentoring and advice-giving, it is possible to see how human rights due diligence can be implemented through a partnership between smaller and larger businesses and how the latter can both set standards that dictate conditions to the former and support capacity-building to enhance due diligence procedures.[50]

37. Human rights criteria may be a precondition in calls for tender or a factor when choosing suppliers. This seems to work in practice, at least in some instances, and it has been claimed that supply chain pressures are proving to be a more powerful force for social and environmental change than local regulation.[51]

38. In practice, contractual clauses on "respect for human rights" raise a number of questions and challenges. In using such formal business-to-business measures to incentivize alignment with the Guiding Principles, one fundamental challenge is the fact that a typical business contract involving immediate parties may not be able to take account of actors throughout a long supply chain. However, this is primarily a challenge for larger business enterprises with multi-tiered supply chains that, in line with the Guiding Principles, are expected to exercise human rights due diligence across all tiers, beginning with the areas where the risk of adverse human rights impacts is the most significant. For business enterprises with large supply chains, the use of contractual clauses to incentivize suppliers to meet their responsibility to respect human rights can thus potentially provide a useful tool for managing risks throughout extensive networks. There is a risk, however that small and medium-sized enterprises could simply avoid such demands by marketing their products to other competitors that do not utilize contractual clauses and do not prioritize

[48] D. Jamieson et al, *Large Businesses and SMEs: Exploring how SMEs interact with large businesses* (ORC International, 2012). Available from www.gov.uk/government/uploads/system/uploads/attachment_data/file/34639/12-1196-exploring-how-smes-interact-with-large-businesses.pdf.

[49] See "Small business: a global agenda", p. 22 (footnote 28 above).

[50] See L. Spence, "CSR and Small Business in a European Policy Context: The Five 'C's of CSR and Small Business Research Agenda 2007", *Business and Society Review*, Vol. 112, Iss. 4 (December 2007), p. 533.

[51] See G. Starcher, "Responsible Entrepreneurship: Engaging SMEs in Socially and Environmentally Responsible Practices" (European Bahá'í Business Forum, 2005) p. 23.

protection and promotion of human rights within their company ethos. Those that take such a position may have a strategic advantage within the marketplace because those measures may cut production costs. It is therefore imperative that a level playing field be created within a given industry.

39. In fact, lessons on the ground also show that restrictive contracts with small and medium-sized subcontractors may generate adverse human rights practices in certain circumstances, as larger business enterprises knowingly outsource human rights risks to these enterprises. That is an issue that larger business enterprises need to take into account in their own human rights due diligence.[52]

40. The lessons on the ground also suggest that larger business enterprises, including transnational corporations, need to do much more to support and share lessons of social responsibility with the small and medium-sized enterprises in their supply chain. This is not to say that some transnational corporations have not increasingly prioritized training for smaller enterprises in their supply chain in recent years. Some companies have, for example, made policy commitments to promote human rights in their supply chains and provided training and guidance to suppliers.[53]

C. Role of States in supporting small and medium-sized enterprises

41. In the experience of the Working Group, small and medium-sized enterprises expect guidance from Governments, including with regard to their responsibility to respect human rights. In that regard, the above-mentioned report of the International Organization of Employers and ILO confirmed that such enterprises were clear in terms of the support they expected from Government, which was to provide effective guidance to business enterprises (76 per cent), draft and enforce clear laws (75 per cent) and deny access to public support services to firms abusing human rights (49 per cent).

42. The development of small and medium-sized enterprises is a central part of government policy, including through the subsidies, grants and training provided. In economies with significant informal sectors, governments can provide a systematic plan for lifting such enterprises from the informal to the formal economy. Those policy tools and others employed to develop and support enterprises provide opportunities for raising awareness of the concepts in the Guiding Principles and affirm government expectations that all business enterprises within its jurisdiction meet the responsibility to respect human rights. Governments can embed the Guiding Principles as a central policy objective of their programmes relating to enterprises, including as a key part of the training and capacity-building activities that government departments offer. The implementation of the corporate responsibility to respect human rights should also be made a requirement for receiving government subsidies and grants.

43. In countries that are in the process of transitioning informal sector activities to the formal sector, programmes aimed at formalizing the activities of small and medium-sized enterprises provide an entry points to support government promotion of the implementation of the Guiding Principles by enabling outreach to a large section of the enterprise community.

44. A key consideration for Governments in these contexts is the need to "translate" the Guiding Principles and the implications of the corporate responsibility to respect human rights into concepts that are understandable to the local business community and that reflect local human rights challenges. General guidance for small and medium-sized enterprises,

[52] See M. Anner, J. Bair and J. Blasi, "Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labour Violations in International Subcontracting Networks", *Comparative Labour Law and Policy Journal* (2013) p. 35. See also R. Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy* (Cambridge University Press, 2013), p. 126.

[53] See, for example, http://corporate.mcdonalds.com/mcd/sustainability/sourcing/workplaces-human-rights.html; www.coca-colacompany.com/our-company/human-rights-policy; and www.nestle.com/aboutus/suppliers.

such as that of the European Commission[54] and the Guiding Principles themselves, can provide useful references for the translation that Governments must do to promote implementation of the Guiding Principles domestically.

45. That task will no doubt have to overcome the traditional psychological hurdle of perceiving small and medium-sized enterprises as local economic growth institutions with little or no focus on social responsibility. However, as all States have a duty to protect human rights from business-related human rights abuse, an important aspect is to foster respect for human rights by such enterprises and other businesses, which should be included as part of a government's overall approach to implementing the Guiding Principles at the national level. The Human Rights Council has called on Governments to develop national action plans on business and human rights,[55] and, as the Working Group explains in its guidance on those plans, such plans need to be developed through an inclusive process involving all stakeholders.[56] In such processes, small and medium-sized enterprises should not be overlooked.

46. An example of this relationship in practice is the Modern Slavery Act 2015 of the United Kingdom of Great Britain and Northern Ireland.[57] While the core obligations — to monitor and control operations and ensure the absence of human trafficking and slavery — only apply to businesses with an annual turnover of more than GBP 36 million, those businesses also have reporting obligations with regard to their supply chains. That means that small and medium-sized enterprises are likely to see contractual requirements in dealings with large businesses, requiring the former to report how they operate in respect of the Act.[58] As a result, small and medium-sized enterprises will have to adopt similar reporting practices as the large businesses with which they establish contracts. Furthermore, along with the rest of the supply chain, they will contribute to efforts to eliminate slavery and human trafficking.

47. Apart from the deliberate policy adjustment necessary to support small and medium-sized enterprises in their implementation of the Guiding Principles, particular attention should be paid to existing and future legislative and regulatory initiatives that have implications for them. Regulation is a key driver for fostering business respect for human rights. For example, the Modern Slavery Act, which was not directly aimed at small and medium-sized enterprises, has in practice proved very relevant to their work.

48. Several existing initiatives provide opportunities to promote further action by States to support small and medium-sized enterprises in implementing the Guiding Principles. For example, in 2010, the Asia-Pacific Economic Cooperation (APEC) launched an initiative on the business ethics for these enterprises in the organization. It has utilized that agreement to develop standard principles for codes of ethics in target sectors, build capacity to assist interested organizations in drafting and implementing codes consistent with APEC principles and generate awareness and collaboration among all key stakeholders.[59] Aligning such efforts with the Guiding Principles could be an effective way of reaching a large number of State-owned enterprises.

49. Business enterprises have called on States to take action to promote the Guiding Principles among them, including small and medium-sized enterprises. In a 2017 statement, the Business 20, part of the official Group of 20 dialogue with the global business community, calls on the Group to promote the Guiding Principles and the OECD Guidelines for Multinational Enterprises in order to strengthen responsible business

[54] Available from http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en.
[55] See Human Rights Council resolution 26/22.
[56] See Working Group on business and human rights, "Guidance on National Action Plans on Business and Human Rights" (2016). Available from www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.
[57] Available from www.legislation.gov.uk/ukpga/2015/30/contents/enacted.
[58] See http://deviant.co.uk/the-modern-slavery-act-2015-a-guide-for-smes.
[59] See http://mcprinciples.apec.org/CMFiles/Resources%202015/GeneralOverview.pdf.

conduct and shape a global level playing field.[40] The Working Group has also called on the member States of the Group to show leadership in promoting implementation of the Guiding Principles by States and business enterprises to advance sustainable supply chains. Such commitment by the Group would build upon the Group of Seven declaration of 2015, in which States expressed their strong support for the Guiding Principles, urging implementation of human rights due diligence by business enterprises and committing to increase their support to help small and medium-sized enterprises develop a common understanding of due diligence and responsible supply chain management.[41]

50. National human rights institutions have also led the way in championing guidance on human rights for business enterprises. The United Kingdom Equality and Human Rights Commission, for example, has published guidance on why human rights are important for business enterprises[42] and specific guidance tailored to small and medium-sized enterprises.[43] Equally, the National Human Rights Commission of Korea has promoted human rights-oriented management culture for these enterprises.[44]

D. Role of trade unions

51. Trade unions play an integral part in the protection of workers human rights and have often been at the forefront of protecting human rights through the participation of their members. In its 2016 Global Rights Index report, entitled "The world's worst countries for workers", the International Trade Union Confederation highlighted four human rights areas where State actions had violated individuals human rights. These included: large-scale exclusion of workers; the violation of the right to collective bargaining, free speech and public protests; and an increase in violence. The Confederation has also published specialized reports that focus on areas of key concerns to trade unions and offer concrete recommendations through identifying problems.

E. Role of business initiatives and associations

52. Business and peer group associations can play an important role in harnessing the potential of small and medium-sized enterprises to develop their capacity to respect human rights. Business associations such as the International Organization of Employers, which claims its member organizations represent a range of businesses — including small and medium-sized enterprises — in 150 countries, are well placed to raise awareness of and promote implementation of the Guiding Principles within the business community. In providing support in terms of training, advice, resources such as benchmarking, and communication standards and indicators, business associations provide such enterprises with opportunities to understand the requirements of the Guiding Principles and to bring together enterprises of similar size and focus and within the same geographical context.

53. The International Chamber of Commerce actively encourages its members to integrate United Nations human rights initiatives into their policies and programmes, and has provided specific information and guidance on human rights to its members.[45]

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[40] See www.b20germany.org/fileadmin/user_upload/documents/B20/b20-handout-recommendations-sdgs.pdf.

[41] See https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf. See also www.elcht.org/EN/News/Events/Pages/DisplayNews.aspx?NewsID=16070&LangID=E.

[42] See https://www.equalityhumanrights.com/sites/default/files/a_guide_to_business_and_human_rights_1_1.pdf.

[43] See https://www.equalityhumanrights.com/sites/default/files/fairness_dignity_and_respect_in_smc_workplaces.pdf.

[44] See www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&boardtypeid=7003&boardid=706169#.

[45] See https://iccwbo.org/global-issues-trends/global-governance/business-and-the-united-nations/.

54. Industry organizations such as the International Petroleum Industry Environmental Conservation Association[66] and the International Council on Mining and Metals[67] also actively promote implementation of the Guiding Principles within their respective sectors, and have developed a range of practical tools to support business enterprises in that regard — which also provide useful references for small and medium-sized enterprises.

55. Business initiatives and associations can take active leadership roles in conveying to their members that implementing the Guiding Principles is in their interest and can play prominent roles promoting human rights throughout the world, because of their reach and considerable size. Given that global reach, it is imperative that business initiatives and associates work with all stakeholders and human rights actors to help advance the implementation of the Guiding Principles.

56. Joining with other firms in own-supply chain relationships could also lead to greater respect by small and medium-sized enterprises for human rights. Those that are members of many business networks and associations perceive their social and environmental responsibilities as more important.[68] Networks can also help to engage enterprises holistically, with approaches tailored for specific sectors.

F. Role of international organizations

57. The above-mentioned report of International Organization of Employers and ILO highlighted that small and medium-sized enterprises expected international organizations to: share information about challenges and best practices globally and regionally (79 per cent); promote business respect for human rights and, where requested, help States meet their duty to protect against human rights abuses by business enterprises (67 per cent); develop the capacity and raising the awareness of their member States (54 per cent); and provide opportunities to participate in the activities of international organizations (49 per cent).

58. However, the majority of tools aimed at supporting the development of small and medium-sized enterprises and their responsible conduct currently do not incorporate the Guiding Principles. Thus, there is considerable scope for progress by addressing this gap. Below are some of the many tools that are designed to help such enterprises to implement policy frameworks, including how to assess strengths and weaknesses through policy design and implementation, and which should align with the Guiding Principles.

59. The OECD Small and Medium-Sized Enterprises Policy Index,[69] created in 2006 in partnership with the European Commission, the European Bank for Reconstruction and Development and the European Training Foundation, was designed as a tool to assess the policy frameworks of small and medium-sized enterprises in emerging economies and monitor progress in policy implementation over time. It allows for comparison across countries and measures convergence towards good practices and relevant policy standards that support Governments in setting targets for policy development helping to identify strategic priorities for improving business environment.[70] Ensuring integration of the Guiding Principles and references to relevant tools for Governments and enterprises would help to strengthen policy coherence and reinforce efforts to promote implementation of the Guiding Principles.

60. The International Trade Centre's (ITC) is the only multilateral agency fully dedicated to supporting the internationalization of small and medium-sized enterprises, with a particular geographical focus on doing so in the least developed countries. In order to achieve their mandate the ITC has developed a "Market Analysis Tools portal" which is

[66] See www.ipieca.org/about-us.

[67] See www.icmm.com/en-gb/about-us.

[68] See United Kingdom Department of Trade and Industry, *Engaging SMEs in Community and Social Issues* (London, 2002).

[69] Available from www.oecd.org/globalrelations/smallandmedium-sizedenterprisesmepolicyindex.htm.

[70] See www.oecd.org/globalrelations/smallandmedium-sizedenterprisesmepolicyindex.htm.

"the access point to one of the world's largest databases on trade statistics, tariff data, foreign direct investment data and voluntary standards".[71] The ITC portal allows these enterprises to have access to five individual tools that improve transparency through business analysis. The tools furthermore; "enable business enterprises and trade support institutions to identify export and import opportunities and compare market-access requirements that help policymakers monitor national trade performance and prepare for trade negotiations".[72] The tools centre around mapping exercise for enterprises and include a trade, market access, investment, competitiveness and standards map that allow business enterprises to view information on: trade statistics, tariffs and market requirements, foreign direct investment data, voluntary standards, public tender information, market analysis studies, capacity-building in market analysis, and trade competitiveness. The ITC tools thus provide yet another entry point to support the uptake by small and medium-sized enterprises of the Guiding Principles and should incorporate them.

61. ILO has also developed a number of business initiatives aimed at supporting small and medium-sized enterprises and entrepreneurs through training programmes, business practices and statistical data under the umbrella of the "Start and Improve Your Business Programme". The Programme claims to be the largest global business management training programme with a focus on starting and improving businesses as a strategy for creating more and better employment for women and men.[73] Under the Programme, ILO offers a range of publications, brochures, evidence based articles and news-based resources aimed at supporting sustainable development goals by promoting: (a) business development policies that support decent job creation and entrepreneurship and encourage the growth of micro-, small and medium-sized enterprises; and (b) productive employment and decent work for all, including young people and persons with disabilities. With the 2017 revision of its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (see para. 19), which incorporates the Guiding Principles, ILO will play a particularly important role in supporting action on small and medium-sized enterprises that is aligned with the Guiding Principles and in providing a key reference for transnational corporations in their role to respect human rights throughout global valued chains.

62. The United Nations Conference on Trade and Development (UNCTAD) through its Enterprise Development Branch, has designed a number of training programmes on policies for small and medium-sized enterprises, as well as capacity-building efforts to empower individuals from developing countries. These include the EMPRETEC programme,[74] entrepreneurship training, the Entrepreneurship Policy Framework and Implementation Guidance,[75] the Business Linkage Programme,[76] and the e-Tourism Initiative.[77] UNCTAD has also developed a number of transparency and accountancy programmes to help small and medium-sized enterprises, for example, on corporate responsibility reporting, and accounting.

63. Among regional organizations, the European Commission, in addition to offering specific guidance for small and medium-sized enterprises, has prepared a number of sectoral guides[78] that provide direction for businesses to implement the Guiding Principles.

64. Many of the existing tools available to small and medium-sized enterprises allow them not only to analyse critically their shortcoming but also to utilize their capacity-building programmes. The ILO Sustaining Competitive and Responsible Enterprises

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[71] See www.intracen.org/itc/market-info-tools/market-analysis-tools/.

[72] Ibid.

[73] See www.ilo.org/empent/areas/start-and-improve-your-business/lang--en/index.htm.

[74] See http://empretec.unctad.org/.

[75] See http://unctad.org/en/Pages/DIAE/Entrepreneurship/Entrepreneurship-Policy-Framework-and-Implementation-Guidance.aspx.

[76] See http://unctad.org/en/Pages/DIAE/Enterprise%20Development/Business-Linkage-Programme.aspx.

[77] See http://unctad.org/en/Docs/tdxipbd6_en.pdf.

[78] https://ec.europa.eu/anti-trafficking/publications/european-commission-sector-guides-implementing-un-guiding-principles-business-and-hum-0_en.

programme[79] provides global technical assistance to help such enterprises develop and create decent work. The overall objective of the programme is to assist them in becoming more sustainable by being cleaner, more productive and competitive, and by providing more sustainable and decent work. Through the ILO programme, enterprises are expected to: improve worksite management and reduce unnecessary work by implementing "5S" organization systems in order to: (a) improve quality and productivity; (b) improve human resource management abilities and create a better communication environment for both management and workers; (c) boost corporate responsibility through environment management and cleaner production so as to achieve higher economic returns; (d) improve occupational health and safety management; and (e) create a better work environment.[80]

65. The above-mentioned report of the International Organization of Employers and ILO highlighted the limitations of external advice and guidance for small and medium-sized enterprises. For example, it found that participants in the above-mentioned ILO programme reported that any offering aimed at smaller enterprises should be made available in small, easily digestible doses and be highly relevant and applicable to business needs.[81] That conclusion was reached as the survey found that most small and medium-sized enterprises only had the managerial capacity to comply with the day-to-day running of the business, and little time was available for business development or off-site capacity-building training events. It also found that they tended to underestimate the benefits of external advice because they were not regularly exposed to international best practices, even when that advice would increase productivity and improve their human rights standards and practices. Furthermore, it found that capacity-building programmes should explain in clear and practical language what they offered and the benefits that small and medium-sized enterprises could derive from their services. Testimonials from fellow chief executives and managers were considered best at convincing enterprises that it was worth investing their time and resources in a training programme.

66. The 2030 Agenda for Sustainable Development and the Sustainable Development Goals, adopted by the General Assembly in September 2015, foresee a significant role for business enterprises, including small and medium-sized enterprises. In its resolution 70/1, the General Assembly called upon all businesses to apply their creativity and innovation to solving sustainable development challenges, while acknowledging the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. In the resolution, States committed to fostering a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard, such as the Guiding Principles. United Nations programmes and agencies can play an important role in translating human rights into practical guidance that can be used by small and medium-sized enterprises. For example, guidance material for the implementation of Goal 5 of the Sustainable Development Goals, on gender equality, should assist those enterprises that are looking to improve gender equality within its workplace.

III. Conclusions and recommendations

A. Conclusions

67. **While implementation of the Guiding Principles on Business and Human Rights by small and medium-sized enterprises has been lagging, and these enterprises have been largely absent from discussions at the international level about advancing implementation of the Guiding Principles, the present report shows that relatively modest actions by a range of actors could go a long way in beginning to address that gap. Adjustments in the communications by key interlocutors — such as government**

[79] See www.ilo.org/empent/Projects/score/lang--en/index.htm.

[80] See www.ilo.org/jakarta/whatwedo/projects/WCMS_160240/lang--en/index.htm.

[81] See www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_535220.pdf.

departments responsible for the supervision and regulation of such enterprises, as well as other corporate enterprises that form part of their supply and value chains and international organizations that run programmes aimed at smaller enterprises — could also make a significant contribution in addressing the awareness gap. However, an initial challenge remains in the level of awareness of the Guiding Principles in government departments, especially those that focus on economic growth, as those governmental institutions tend to see their role as supporting small and medium-sized enterprises to deliver economic outcomes with rather little interest in social responsibility. Thus, government action and efforts by international organizations are particularly needed to tackle this challenge, which essentially is captured in Principle 8, namely, that States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.[82]

68. Larger transnational corporations, which are most often the "lead" business enterprises in the supply chains in which many small and medium-sized enterprises operate, also have an important role in sharing knowledge and lessons concerning the implementation of the Guiding Principles (although most larger business enterprises are also still at an early stage of the journey to implement the Guiding Principles), and to incentivize compliance with the Guiding Principles through supplier codes of conduct and contractual clauses.

69. In essence, there is an urgent need for strategic leadership, both from governmental institutions and agencies and from within the business community, in order to reach scale in the implementation by small and medium-sized enterprises of the Guiding Principles. In that regard, it is important to consider that these enterprises are not just a scaled-down version of a large firm[83] and take into account the realities they face, which vary greatly across countries and sectors. An effective strategy has to take account of their handicaps, including their resource poverty, limited market share, predominantly informal economy actor (in many, but not all jurisdictions), and relationships with other entities.

70. By developing national action plans, Governments have an opportunity to raise awareness about the human rights responsibilities of small and medium-sized enterprises in a national context and to clarify that the Guiding Principles apply to all enterprises.

71. More accessible and user-friendly information and practical tools will be a good starting point for the essential awareness-raising on human rights responsibilities that needs to happen in virtually all economies. This should be complemented by continuing learning opportunities including training workshops — peer learning programmes that apply the "how-to" approach. Specific programmes on the nature and expectations of international standards for responsible business and sustainable development need to integrate the Guiding Principles.

B. Recommendations

72. In the present report, the Working Group suggests a number of targeted recommendations for States and for other stakeholders, including small and medium-sized enterprises. It welcomes feedback from States and other stakeholders on the report and on the recommendations below.

73. The Working Group recommends that States:

(a) Recognize that as part of their duty to protect human rights from business-related human rights abuse, they will take steps to raise awareness about the implications of the Guiding Principles for small and medium-sized enterprises and

[82] See www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[83] See "A Small Business Is Not a Little Big Business" (footnote 12 above).

incentivize them to implement the Guiding Principles through a mix of mandatory and voluntary measures;

(b) Provide dedicated support for small and medium-sized enterprises in the implementation of the Guiding Principles, including by translating the requirements therein to the local context and providing practice-based capacity-building opportunities for the implementation of the Guiding Principles in collaboration with other stakeholders;

(c) Embed the standards of the Guiding Principles into existing processes and platforms for supporting small and medium-sized enterprises in order to achieve more effective policy coherence across government policies and departments;

(d) Integrate the Guiding Principles in business relationships with small and medium-sized enterprises — by requiring respect for human rights in public procurement processes from those enterprises that benefit from government loans, subsidies and financial services — and in the supply chains and business relationships of State-owned companies;

(e) Involve small and medium-sized enterprises in the development of national action plans for business and human rights as an avenue by which to increase their awareness and communicate the expectations of such enterprises;

(f) Include opportunities to support the implementation of the Guiding Principles in guidance and standards of their development agencies;

(g) Provide dedicated support for small and medium-sized enterprises in the implementation of the Guiding Principles, including by simplifying the requirements of Guiding Principles and providing capacity-building opportunities;

(h) Embed the standards of the Guiding Principles into existing processes and platforms for supporting and incentivizing small and medium-sized enterprises to implement the Guiding Principles;

(i) Work with Government development agencies to include opportunities to support the implementation of the Guiding Principles in their standards;

(j) Create opportunities for more small and medium-sized enterprises to transition from the informal to the formal sector so that they may be fully supported in the implementation of the Guiding Principles.

74. The Working Group recommends that small and medium-sized enterprises:

(a) Seek support from employer and industry associations to learn about international standards and practical tools for implementing the responsibility to respect human rights and engage in peer learning networks;

(b) Draw on lessons from established compliance mechanisms, including environmental sustainability, health and safety, anti-corruption and anti-trafficking;

(c) Use existing social responsibility processes — including Global Compact reporting, sustainability reporting (such as the Global Reporting Initiative), national and international certification standards (such as ISO 26000) — as platforms for implementing the Guiding Principles;

(d) Draw on lessons from established compliance mechanisms and programmes, including environmental sustainability, health and safety, anti-corruption and anti-trafficking;

(e) Utilize peer support systems within and across different sectors to share knowledge, experiences and the implementation of the Guiding Principles.

75. The Working Group recommends that transnational corporations:

(a) Incentivize respect for human rights in business relationships with small and medium-sized enterprises by integrating the Guiding Principles in supplier codes of conduct and contractual clauses;

(b) **Provide guidance and capacity-building for subsidiaries, partners and other business relationships involving small and medium-sized enterprises on the implementation of the Guiding Principles;**

(c) **Provide guidance to small and medium-sized enterprise partners on best practices towards the implementation of the Guiding Principles;**

(d) **Utilize their strategic position to assist their small and medium-sized enterprise members through capacity-building and training programmes.**

76. **The Working Group recommends that business and peer group associations:**

(a) **Raise awareness on the responsibility to respect of human rights throughout their membership and support development of practical tools for small and medium-sized enterprises that reflect their particular situation in the given context and sector;**

(b) **Support and ensure the respect of human rights, including the implementation of the Guiding Principles throughout their supply chains;**

(c) **Use their considerable memberships to promote the Guiding Principles through all forms of communications and inform their members of the latest human rights developments;**

(d) **Promote enhanced competitiveness by improving standards that are linked to incentives throughout the market within which small and medium-sized enterprises operate.**

77. **The Working Group recommends that international organizations and the United Nations system:**

(a) **Integrate the Guiding Principles in tools and guidance and capacity-building aimed at small and medium-sized enterprises;**

(b) **Work toward clarifying standards and simplifying the Guiding Principles for small and medium-sized enterprises;**

(c) **Take a leadership role in creating collaborator initiatives that aim to build up knowledge sharing through the involvement of small and medium-sized enterprises in their activities;**

(d) **Continue to work with States and businesses in order to provide special assistance to small and medium-sized enterprises from the least developed countries and to align such guidance and assistance with the Guiding Principles;**

(e) **Develop and provide online and offline training courses to increase the awareness of the Guiding Principles and their relevance to business.**

78. **The Working Group recommends that academia, trade unions and civil society organizations:**

(a) **Raise the importance that small and medium-sized enterprises implement the Guiding Principles in relevant forums, such as national action plan processes;**

(b) **Support the development of tools aimed at implementation of the Guiding Principles by small and medium-sized enterprises, in order to ensure that such tools take into account the reality of human rights challenges and perspectives of victims in the respective context;**

(c) **Dedicate increased attention to small and medium-sized enterprises, with a view to improving human rights, through access to remedy and accountability programmes that highlight national and international law;**

(d) **Gather targeted data for small and medium-sized enterprises and their human rights obligations and performance, in order to identify gaps and good practices globally;**

(e) **Provide capacity-building programmes aimed at protecting and promoting human rights.**

United Nations A/HRC/35/32/Add.1

General Assembly

Distr.: General
1 May 2017

Original: English

Human Rights Council
Thirty-fifth session
6-23 June 2017
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea from 23 May to 1 June 2016.

GE.17-06941(E)
1706941

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* Circulated in the language of submission only.

I. Introduction

1. Further to Human Rights Council resolutions 17/4 and 26/22, the Working Group is mandated to conduct country visits. Two members of the Working Group, Dante Pesce and Michael Addo, visited the Republic of Korea from 23 May to 1 June 2016, at the invitation of the Government. The visit aimed to assess the efforts made to prevent and address the adverse human rights impact of business-related activities, in line with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.[1] The aim was also to support the efforts of the Government, business enterprises and other stakeholders to prevent business-related human rights abuses and strengthen protection against it; identify initiatives, opportunities and challenges in implementing the Guiding Principles; and examine the potential and actual human rights impact of business operations in the country. The visit was the Working Group's second to Asia and followed the 2016 Asia Regional Forum on Business and Human Rights.[2]

2. The experts met officials from the Office for Government Policy Coordination in the Prime Minister's Secretariat, the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Strategy and Finance, the Ministry of Trade, Industry and Energy, the Ministry of Environment, the Ministry of Employment and Labor, the Korea Corporate Governance Service, the Small and Medium Business Administration, Daejeon metropolitan city and Ulsan metropolitan city. They also met representatives of the National Human Rights Commission and the Legislation and Judiciary Committee of the National Assembly, as well as representatives of civil society and victims groups, trade unions (Confederation of Trade Unions, Metal Workers Trade Union, Public and Transport Workers' Union, Union of the Seoul Metropolitan Rapid Transit Corporation, and Union of the Busan Transportation Corporation), and the United Nations Global Compact Network Korea. The experts met representatives of private businesses (POSCO Daewoo, Samsung Electronics, LG Electronics, Hyundai Motors, Hyundai Heavy Industry, and RB Korea (formerly Oxy Reckitt Benckiser) and State-owned enterprises (Electric Power Corporation, Railroad Corporation, Minting and Security Printing Corporation, and National Oil Corporation). They travelled to Seoul, Gwacheon, Daejeon, Sejong and Ulsan.

3. The Working Group is grateful to the Government for its invitation and its fulsome assistance. It also thanks the organizations, businesses, communities and individuals whom it met, and who facilitated site visits and meetings with stakeholders. It appreciated the informative discussions on the progress and challenges in the protection of human rights in the context of business activities.

4. The Working Group describes its findings and makes recommendations for actions that may assist in addressing and remedying the challenges identified.

II. General context

5. The Republic of Korea comprises nine provinces, six metropolitan cities, one special city and one special self-governing city. It has a population of approximately 50 million people.

6. Its economy is one of the world's largest. The Republic of Korea is a member of the Organization for Economic Cooperation and Development (OECD) and joined its Development Assistance Committee in 2010, thus becoming the first former aid recipient country to join as a donor. It is also a member of the Group of 20 and hosted the Group of 20 Summit in Seoul in November 2010.

[1] See A/HRC/17/31, annex.

[2] See www.ohchr.org/EN/Issues/Business/Pages/2016AsiaRegionalForum.aspx.

7. The Working Group's visit took place in the context of prior rapid industrial growth and a recent economic slowdown leading to rising unemployment. The Working Group heard about the concentration of economic power in a few large conglomerates, known as "chaebols" (e.g. Samsung, Hyundai, Lotte, LG, SK Group), increasing levels of overseas activities and investments by the country's public and private institutions and companies, and an increase in foreign aid to development cooperation projects abroad.

III. Legislative and policy framework

8. The Republic of Korea is a party to seven of the nine core international human rights treaties.[3] It has issued a standing invitation to the special procedures of the Human Rights Council. It is a member of the Human Rights Council and held the Presidency in 2016.

9. The country has ratified a total of 29 conventions of the International Labour Organization (ILO),[4] 27 of which are still in force and another 2 of which have been denounced. They include four of the eight core conventions, specifically the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No.182). The Republic of Korea has yet to ratify the remaining four, namely the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It has ratified three of the four ILO governance conventions and 22 of its 177 technical conventions. The memorandum of understanding signed by the Ministry of Employment and Labor and ILO in 2003 led to the 2004 launch of a partnership programme to provide technical assistance to implement the ILO decent work agenda in Asia and the Pacific in particular areas that have been identified as ILO regional priorities.[5]

10. The governmental structure is determined by the Constitution, first adopted on 17 July 1948 and last amended by referendum on 29 October 1987. Power is divided among the executive, the judiciary and the legislature. The National Assembly has legislative authority. It is a unicameral legislature composed of 300 members serving four-year terms. Local governments are semi-autonomous and have their own executive and legislative bodies. The President of the Republic of Korea is elected by popular vote and leads the executive branch for a single five-year term. The President presides over a Cabinet that decides government policies. The Prime Minister is appointed by the President and approved by the National Assembly. The Prime Minister supervises the administrative ministries and manages the Office for Government Policy Coordination under the direction of the President. The Prime Minister may attend meetings of the National Assembly. The judiciary operates at national and local levels and consists of the Supreme Court, high courts, district courts, the Constitutional Court, the Patent Court, the Family Court, and administrative and local courts. The courts exercise jurisdiction over civil, criminal, administrative, electoral and other judicial matters.

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[3] It is not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families or to the International Convention for the Protection of All Persons from Enforced Disappearance. It has not signed or ratified: the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; the Optional Protocol to the Covenant on Economic, Social and Cultural Rights; the Optional Protocol to the Convention on the Rights of the Child on a communications procedure; and the Optional Protocol to the Convention on the Rights of Persons with Disabilities. During its universal periodic review in 2012, several recommendations highlighted the importance of ratifying these treaties. See A/HRC/22/10, paras. 124.1-124.2.

[4] See www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103123.

[5] These priorities are: competitiveness, productivity and jobs; labour market governance and social protection; and labour migration. See www.ilo.org/asia/WCMS_400160/lang--en/index.htm.

11. The Constitution is a key document relating to human rights in the Republic of Korea. For example, its article 10 states: "All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." Other relevant provisions prohibit "discrimination in political, economic, social or cultural life on account of sex, religion or social status" (art. 11 (1)), state that "standards of working conditions shall be determined by Act in such a way as to guarantee human dignity" (art. 32 (3)), and provide for the right to independent association, collective bargaining and collective action "to enhance working conditions" (art. 33 (1)). The National Human Rights Commission was established in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).[6]

IV. Awareness of business and human rights

12. Many government officials, State-owned enterprises and large businesses were aware of the Guiding Principles on Business and Human Rights. The Working Group encountered some State-owned enterprises and large businesses, and some government representatives, who were unaware of their duties and responsibilities under the Guiding Principles. The Working Group observed the need for greater coherence across the Government and noted a misunderstanding that the Guiding Principles may be relevant only to the Ministry of Justice, the Ministry of Trade and Industry, and the Ministry of Strategy and Finance. The Guiding Principles should be implemented across the Government and all companies should be aware of, and act in accordance with, their responsibilities outlined in the Guiding Principles. Many companies reported receiving little guidance from the Government on implementing them.

13. The Working Group observed a willingness within the Government and most businesses to study international best practice and improve policies and practices relating to business and human rights, and this commitment should be commended. The Working Group was encouraged to hear the Office for Government Policy Coordination in the Prime Minister's Secretariat state that the Government intended to provide guidance on business and human rights to companies, and facilitate a change in the culture of companies operating domestically and abroad. It looked forward to seeing concrete developments in this regard. It was also pleased to meet vibrant civil society actors who used the Guiding Principles.

14. The United Nations Global Compact Network Korea is active and emphasizes the Guiding Principles in its work. Its Leaders Summit 2015, "Business engagement for achieving sustainable development", demonstrated its interest in business and human rights. The Working Group heard about plans for corporate social responsibility forums for companies operating overseas.

15. The Working Group noted that the National Human Rights Commission had translated the Guiding Principles and the Working Group's guidance on national action plans on business and human rights into Korean, commenced research to establish a business and human rights road map and recommended to the Government that it should develop a national action plan on business and human rights. If the recommendation were to be adopted, that would make the country one of the first in Asia to do so. During the Working Group's visit, and in connection with the eleventh Jeju Forum for Peace and Prosperity, the National Human Rights Commission held a conference on the national action plan on business and human rights, which was attended by around 300 stakeholders from Government, business and civil society. The Working Group regarded that as positive, but heard concerns from some civil society organizations that they had not been invited.

[6] See General Assembly resolution 48/134, annex.

V. Issues in context

A. Allegations received

16. Although the Working Group was impressed with some of what it heard, civil society highlighted a large number of allegations of consumers, employees or subcontractors suffering due to the action, or inaction, of companies. These included the cases set out below.[7]

17. In the humidifier disinfectant case, it is alleged that 1,136 people died and 4,305 suffered ill health owing to exposure to hazardous chemicals found in humidifier sterilizers.[8] Since 2011, hundreds of mainly women and children have suffered from respiratory failure, acute pneumonia and other lung diseases as a result of using humidifier sterilizers manufactured and sold by several business entities, including Aekyung Co. Ltd., Costco Wholesale Korea, E-mart Co. Ltd., GS Retail Co. Ltd., Hanvit Chemical Co. Ltd., Home Plus Co. Ltd., Lotte Shopping Co. Ltd., Oxy Reckitt Benckiser, and SK Chemicals.[9] It is alleged that investigations carried out by the Government to identify victims were based on a classification scheme which resulted in identifying only a limited number of victims and potentially excluded victims eligible for financial support, health monitoring and other remedies. In response to this allegation, the Government informed the Working Group that it had introduced a system for potential victims who had not been found eligible for compensation to file objections. The case also concerned the lack of research into the health risks of inhaling a substance destined for domestic use, the lack of information about the risks associated with the product, and a company taking five years to accept responsibility. The National Human Rights Commission called for the Government and the companies concerned to acknowledge responsibility and provide remedies for victims. It also recommended that the Government should expand support for victims of the deadly humidifier sanitizer and improve the management system, including the assessment of the harmful impact of chemical materials to prevent recurrence of such tragedy. RB Korea (formerly Oxy Reckitt Benckiser) has issued an apology, accepting responsibility for the role that Oxy's humidifier sanitizing product played and the delay in providing an adequate remedy.[10] It has also set up a compensation plan.[11] The Working Group heard complaints that it was inadequate in scale and scope.

18. It is also alleged that workers at third-tier suppliers of Samsung Electronics and LG Electronics, namely YN Tech, BK Tech and Deogyong ENG, were diagnosed with acute optic nerve damage and toxic encephalopathy as a result of methanol poisoning at the workplace.[12] Allegedly, the exposure occurred during the cutting and moulding of aluminium parts for use in mobile phones, as workers were not provided with adequate health and safety training, information, ventilation or protection (gloves, eye masks and breathing masks), in violation of the Occupational Safety and Health Act (art. 5), and exposure could have been avoided, in part, by replacing methanol with ethanol.

19. At Samsung Electronics semiconductor and liquid crystal display factories, there were allegations of over 220 cases of worker illness and deaths, including from leukaemia, brain cancer and ovarian cancer.[13] The illnesses allegedly resulted from deficiencies in

[7] Some of these allegations were also addressed in a report by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (A/HRC/33/41/Add.1).

[8] Figures provided to the Working Group by the Government.

[9] See communication sent on 12 February 2016 by a number of special procedure mandate holders detailed in A/HRC/32/53.

[10] See www.rb.com/media/1674/rb-hy-2016-final.pdf, p. 9, and www.rb.com/media/news/2016/may/oxy-rb-and-humidifier-sterilizers-in-korea/.

[11] See www.rb.com/media/1801/4-fact-sheet-oxy-rb-korea-v5_jp-final-comments.pdf.

[12] See http://labourhealth.or.kr/42439, press statement.

[13] International Trade Union Confederation, "Samsung: modern tech, medieval conditions", pp. 13-14. Available from www.ituc-csi.org/IMG/pdf/samsung_web_en.pdf.

health and safety management and exposure to hazardous substances. Concerns related to a lack of information regarding the substances that victims were exposed to on the basis of trade secrets, a stalled negotiation between Samsung Electronics and the victims, and the use by the Korea Workers' Compensation and Welfare Service of a restricted definition of occupational diseases, which made it difficult to claim compensation.

90. Allegations of environmental damage and health effects in Dangjin[14] relate to the rapid overdevelopment of coal-fired thermal power plants and Hyundai steel mills causing excessive air pollution resulting in deaths, cancers and other health effects. The Working Group heard that Dangjin was now the highest carbon emitting city in the country and that its increase in the carbon emission rate was 9.5 times the national increase. Local residents alleged that they had not been consulted about the construction of additional thermal plants, whereas the Government stated that an environmental impact assessment, including discussions with local residents, had been carried out. Despite the presence of high levels of urinary arsenic, excessive levels of fine dust, toluene and benzene, there was limited restriction on the companies' operations.

91. Allegations have also been brought in the Seoul Central District Court concerning POSCO Daewoo's land purchase in Myanmar.[15] Twenty people from Myanmar are claiming compensation related to the Shwe gas project and the purchase of land by POSCO Daewoo in 2010 for its onshore gas terminal in Myanmar. POSCO Daewoo reportedly paid compensation to 120 households but the amount was claimed to be insufficient given the value of the land, and the subsequent environmental damage caused by contaminated water and industrial waste. It is alleged that the compensation agreement with the residents was influenced by a group of former high-ranking military officials who had de facto control over the land, that there was inadequate consultation with the communities living on the land, that the land confiscation led to forced displacement, and that there was no grievance mechanism and scrutiny of the project.

92. Allegations of forced eviction of residents living in Odisha, India, have been made following the granting by the Indian Government of concessions to the Pohang Iron and Steel Company for the construction of an integrated steel plant and a captive port. Concerns were raised that the project could force up to 20,000 people to leave their homes and land, without adequate safeguards and guarantees that their rights would be respected.[16]

93. There have also been allegations of child labour and forced labour in Uzbekistan[17] in the cotton linter pulp supply chain of the Korea Minting and Security Printing Corporation (KOMSCO). KOMSCO sources cotton linter pulp from Uzbekistan for use in banknotes and passports. In 2010 KOMSCO and Daewoo International established Global KOMSCO Daewoo in Uzbekistan to purchase cotton linter pulp. Concerns were raised about the alleged refusal by KOMSCO to monitor the cotton linter pulp supply chain, engage in supply chain management or conduct human rights due diligence following concerns about child labour and forced labour.[18] KOMSCO showed the Working Group its code of conduct on social and environmental standards, which prohibited child labour.

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[14] See http://media.peoplepower.org/Cargo/?VP3=SearchResult_VPage&STID=27MZIFJ6ITA9O.

[15] Lee Kyung-min, "Law students put more on POSCO Daewoo-Myanmarese dispute", *Korea Times*, 17 March 2016, and Earthrights International, "The Burma-China pipelines: human rights violations, applicable law, and revenue secrecy", Situation Briefer No 1, March 2011. Available from www.kwantoon.co.kr/news/news/2016/03/116_200611.html and www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf, respectively.

[16] See "India: Urgent call to halt Odisha mega-steel project amid serious human rights concerns", press release issued by several special procedures mandate holders, 1 October 2013, available from http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13805&LangID=E.

[17] See ILO, "Third Party Monitoring of the use of child labour and forced labour during the Uzbekistan 2015 Cotton Harvest" (November 2015). Available from www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_427620.pdf.

[18] Kim Young-jin, "Ugly truth behind banknotes", *Korea Times*, 11 December 2013. Available from www.koreatimes.co.kr/www/common/printnews.asp?categoryCode=316&newsIdx=147819. The Cotton Campaign, "KOMSCO asked to stop using forced-labor cotton in Korean currency".

24. Allegations were made of trade union repression at Hyundai Motors' supplier, Yoosung Enterprise Ltd, in relation to industrial action (which led to the suspension of production of engine piston rings) taken by the Yoosung branch of the Korean Metal Workers' Union. Hyundai Motors denied any connection to the case and said it was not involved in, responsible for, or interested in the business affairs of its supplier. The Working Group heard about significant pressure that Hyundai Motors allegedly applied to trade union activists, resulting in the suicide of one activist on 17 March 2016.[19] It was also alleged that, despite trade union requests, the Ministry of Employment and Labor did not conduct special labour inspections at Yoosung.

25. Health and safety concerns were raised due to the serious, and fatal, injuries suffered by workers in the Ulsan shipbuilding industry, particularly workers in the third and fourth tier of the supply chain of Hyundai Heavy Industries.[20] Workers complained of workplace injuries being concealed or covered up by subcontracting companies, lack of recognition of the subcontracted workers' union and disadvantages when applying for industrial insurance. The Working Group heard about a surge in workplace-related fatalities, e.g. 3 in 2015 compared to 10 in 2016, according to the Government, or 14, according to the Hyundai Heavy Industries Workplace Injury Network.[21]

26. At the Seoul Metropolitan Rapid Transit Corporation and the Busan Transportation Corporation, workers alleged that engineers developed serious mental health issues leading to a number of suicides owing to adverse working conditions, such as the one-person-on-board system, oppressive management, lack of rest breaks, shortage of qualified engineers and excessive responsibility placed on one driver.

B. Protecting against abuse in supply chains

27. Key to the allegations of business-related human rights abuse in the present chapter is the apparent failure by lead companies to adequately oversee their supply chains and the lack of willingness to take effective responsibility for preventing, or mitigating, the human rights impact linked to their operations. Several of the cases implicating large companies relate to abusive working conditions endured by temporary workers employed by subcontractors, the outsourcing to subcontractors of operations with high human rights risks and the existence of "mul-yang teams" (hidden supply chain tiers of night-time workers).[22] The risk of human rights abuse tends to be higher lower down the supply chain, and particularly where supply chains extend overseas. A 2014 study undertaken by the National Human Rights Commission on the conditions of industries with a high risk of occupational injury found that many subcontracted workers experienced worse working conditions and received less safety information and training than directly employed workers.

28. The Ulsan shipyard operated by Hyundai Heavy Industries, mentioned above, demonstrates the issue. The shipyard employs around 55,000 workers, of whom about 29,000 work for subcontractors and 26,000 are employed by Hyundai Heavy Industries. In 2012, more than 60 per cent of production workers (exposed to high health and safety risks) were subcontractors;[23] a figure that has since risen to 80 per cent.[24] The shipyard has experienced an average of six fatal work accidents annually over the past 10 years with 71 per cent of those affecting subcontracted workers.[25] Of the seven workers that died in the

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14 June 2013. Available from www.cottoncampaign.org/harvest-2016/komsco-asked-to-stop-using-forced-labor-cotton-in-korean-currency.

[19] See www.industriall-union.org/hyundai-stop-union-busting-at-your-suppliers-1.

[20] See www.industriall-union.org/korean-unionists-alert-world-to-deaths-at-hyundai-shipyards.

[21] See https://unsafehhi.org/table-of-fatalties/.

[22] See http://laborhealth.or.kr/index.php?mid=journal&category=41072&document_srl=41187.

[23] See www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=c/wp6(2014)10/final&doclanguage=en page 19.

[24] See http://goodelectronics.org/publications-en/a-report-on-workplace-injuries-at-hhi.

[25] See www.industriall-union.org/sites/default/files/uploads/documents/2015/Korea/list_of_dead_hhi_workers.pdf.

first five months of 2016, the Government reported that three were subcontracted workers, while the Hyundai Heavy Industries Workplace Injury Network put the number of deceased subcontracted workers at five.[26] The In-house Subcontractor Workers' Union in Hyundai Heavy Industries accused the company of "risk outsourcing".[27] Hyundai Heavy Industries said the higher number of fatal accidents among subcontracted workers was because they were less experienced manual labourers (with an average of two years of experience), whereas directly employed workers were highly skilled (with an average of 18 years of experience).

29. Companies must take responsibility for respecting human rights across their supply chain and address adverse human rights impact in any part of their operations. According to the Working Group, "in principle, any business, wherever it is in the supply chain, can be involved with human rights abuses through causing, contributing to, or being directly linked to them as a result of its business relationships with other parties."[28] Guiding Principle 13 requires that companies "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."

30. The Working Group heard about different approaches to human rights due diligence in supply chains. Some companies had integrated human rights due diligence into their operations and included respect for human rights as a condition in their contracts with suppliers.[29] Korea Railroad Corporation highlighted its commitment to human rights due diligence beyond the first tier of suppliers, citing the important role that trade union activity had played in shaping its culture. It reported on-site visits to monitor compliance of first-, second- and third-tier suppliers, and said that suppliers were obliged to notify it about new subcontracting arrangements. It said that a telephone hotline was available to workers of first-, second- and third-tier suppliers. The company was committed to its supply chain: "KR is implementing human rights management that respects the inalienable rights of not only KR's employees, but the employees of KR's business partners, customers, and the local residents".[30] However, other companies referred to their relationship with suppliers as one of dependence and trust. They indicated that it would be inappropriate for the lead company to impose its own policy on suppliers, so the first-tier supplier would merely be informed about the lead company's code of conduct and encouraged to follow certain standards. In the main, even when compliance with human rights standards was a mandatory requirement for suppliers, human rights due diligence by lead companies was limited to monitoring first-tier suppliers. They were then relied on to ensure that suppliers lower down the supply chain respected human rights and adhered to the lead company's code of conduct. Telephone hotlines used to report grievances and on-site inspections were mainly for direct employees of lead companies and not for workers further down the supply chain. Companies with human rights policies did not always acknowledge that their human rights responsibilities meant they needed to follow their impact, if necessary across the entire supply chain. For some companies a major reason for subcontracting was to outsource risk, for instance, stemming from poor workplace safety. Some companies argued that it was practically impossible for them to monitor their supply chains beyond their direct suppliers and Hyundai Motors indicated that reported human rights abuse implicating one of its direct suppliers was none of its business.

31. The Working Group also heard that article 18 (prohibition of unreasonable intervention in management) of the Fair Transactions in Subcontracting Act, according to which "the prime contractor shall not intervene in the management of the subcontractor by

[26] See https://unsafekhi.org/category/press-release/.

[27] See www.industriall-union.org/one-worker-a-month-dying-at-worlds-biggest-shipbuilder.

[28] A/71/291, para. 35.

[29] See, for instance, the Supplier Code of Conduct of Samsung Electronics, p. 4. Available from www.samsung.com/us/aboutsamsung/for_partners/downloads/samsung-supplier-code-of-conduct-guide-ver-2-2.pdf.

[30] Korea Rail Network Authority, *Sustainability Report 2016*, p. 55. Available from http://english.kr.or.kr/sub/info.do?m=0103.

means of regulating the quantity of the subcontract",[31] was being interpreted by some lead companies as restricting them from intervening beyond first-tier suppliers regarding possible supply chain problems. However, this provision restricts companies only from interfering with the management of subcontractors regarding the volume of goods; it does not restrict a lead company from addressing human rights issues in its supply chain. The Working Group urges relevant authorities to provide guidance on the legally compliant steps that lead companies can take in monitoring their supply chain, particularly in relation to health and safety issues.

32. Companies with complex supply chains should identify and prioritize areas with the greatest risk of negative human rights impact.[32] Companies should establish grievance mechanisms to enable adverse human rights impact to be identified. These should be available to all workers and individuals who may be adversely affected. Business operations with a high risk of industrial injury should insist on transparency, incentivize efforts by subcontractors to improve safety conditions. Lead companies should use their leverage to ensure that subcontracted workers have access to effective grievance mechanisms. The Government acknowledged the need for companies to protect against abuse in supply chains but more needs to be done to improve protection and bring supply chain relationships into line with international human rights standards.

C. Business-related human rights abuse outside the country

33. Some of the allegations detailed in the present chapter concern the overseas activities of companies based in the Republic of Korea, reflecting the fact that the business operations of these companies are increasingly transnational. The risk of companies being involved in human rights abuse abroad will be higher in countries with weaker regulatory frameworks.[33] The Working Group was concerned to hear that companies operating abroad did not give much attention to the heightened need for human rights due diligence in relation to overseas operations. Government and company representatives recognized that more work should be done in this area. Companies should develop mechanisms to allow grievances to be immediately brought to their attention to prevent harm from escalating. The Government of the Republic of Korea and its embassies should assist companies to identify, prevent and mitigate human rights risks related to overseas activities. While the Working Group heard some training had been delivered by the Embassy in Sri Lanka, the situation required the implementation of a comprehensive training programme. The Government and companies need to pay more attention to how companies operating overseas exercise human rights due diligence to avoid causing human rights harm. The Working Group emphasizes the importance of facilitating access to remedy in cases of human rights abuses related to companies' operations abroad. It is in the national interest to prevent companies from having adverse human rights impact abroad and address problems at the earliest opportunity.

VI. Economic actors

A. The State as an economic actor

34. The country has many State-owned enterprises which, like all companies, must avoid causing adverse human rights impact under the second pillar of the Guiding Principles. The State is expected, under the first pillar, to take additional steps to ensure that

[31] See https://elaw.klri.re.kr/eng_service/lawView.do?hseq=31928&lang=ENG.

[32] Guiding Principle 24.

[33] See J. Ruggie, "Making economic globalization work for all: achieving socially sustainable supply chains", address to G-20 Labour and Employment meeting, 15 February 2017. Available from www.shiftproject.org/media/resources/docs/Hamburg-Keynote-2017.pdf.

State-owned enterprises respect human rights in their operations.[34] The Working Group was pleased to hear that the Public Institutions Policy Bureau in the Ministry of Strategy and Finance organizes an annual evaluation, led by experts, to measure the performance of State-owned enterprises.[35] It was also pleased to learn about the *Guidelines for Human Rights Management and Checklist*, which the National Human Rights Commission issued to 117 public institutions, including State-owned enterprise.[36] However, some State-owned enterprises had little idea of what the Guiding Principles required and more should be done to highlight to State-owned enterprises the steps, such as human rights due diligence, they must take.

35. The National Pension Fund of the Republic of Korea is the third largest pension fund in the world with a fund reserve of 561 trillion won.[37] The National Pension Service Investment Management is an independent investment management committee whose purpose is to "preserve and grow" the Fund. The Fund is a signatory to the Principles for Responsible Investment[38] and therefore should incorporate environmental, social and corporate governance issues into its investment analysis and decision-making processes, and seek disclosure on these issues by the entities in which it invests. The Working Group learned that, while article 102 (4) of the National Pension Act[39] was inserted in 2015 to enable the Fund to take into account environmental, social and corporate governance factors in relation to investment targets to achieve long-term and stable revenue, there is no formal system to implement environmental, social and corporate governance due diligence by regularly monitoring these aspects of investments. As the Ministry of Health and Welfare has oversight of the Fund, it should provide guidance on this and monitor human rights due diligence across all the Fund's investments.

36. The Export-Import Bank of Korea (Eximbank),[40] appointed by the Ministry of Strategy and Finance as the executor of the Economic Development Cooperation Fund, appraises loan requests, concludes loan agreements, disburses loans and assesses economic aid projects in developing countries. The Working Group heard reports of an absence of human rights safeguards concerning projects for which loans had been made. In keeping with international best practice, all activities of Eximbank should be subject to human rights due diligence and safeguard processes. The Working Group heard that Eximbank had drafted safeguards in 2012 and started running pilot programmes in 2013, with a plan for the safeguards to come into operation in 2017, but that there had been no wide consultation. While the safeguards are vital, any pilot programme should be open to public scrutiny. The Working Group encourages Eximbank to consult with civil society before the safeguard development process is finalized. The safeguards should be based on international human rights standards such as the Guiding Principles, ILO labour standards and the Convention on the Rights of the Child, and take into account the Sustainable Development Goals and the OECD Guidelines for Multinational Enterprises.

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[34] Guiding Principle 4 clarifies that, as part of their duty to prevent and address adverse human rights impact arising from business activities, "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."

[35] OECD and Korea Institute of Public Finance, "State-owned enterprises in Asia: national practices for performance evaluation and management, 2016", p. 48. Available from www.oecd.org/daf/ca/SOEs-Asia-Performance-Evaluation-Management.pdf.

[36] National Human Rights Commission, "NHRCK's Report on Business and Human Rights", press release, 29 April 2013. Available from www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&boardtypeid=7003&boardid=7001572.

[37] See http://fund.nps.or.kr/jsppage/fund/ifm_e/ifm_e_01.jsp.

[38] See www.unpri.org/about/the-six-principles.

[39] See http://elaw.klri.re.kr/eng_service/lawView.do?hseq=33644&lang=ENG.

[40] See www.koreaexim.go.kr/site/main/index002.

37. The Korea Exchange joined the Sustainable Stock Exchanges Initiative in 2015[41] and uses the Dow Jones Sustainability Index Korea.[42] RobecoSAM (one of the entities behind the Index) and the Korea Productivity Center evaluate non-financial elements of 200 companies listed on the Korea Exchange. The questionnaire sent to companies asks whether a company has a corporate human rights policy, conducts human rights due diligence, conducts an assessment of potential human rights issues across its own operations or value chain and publicly discloses progress on human rights issues to show how it is dealing with human rights issues.[43] The Working Group encourages this specificity and considers it appropriate for all listed companies to report in this way.

38. The Public Procurement Service handles public procurement. An amendment to the Government Procurement Act allows the Service to reflect social and environmental factors in procurement processes in order to promote corporate social responsibility. However, this is not mandatory and the Government should provide criteria for the evaluation of non-financial factors in public procurement bidding processes. It should also take steps to require disclosure of social and environmental factors during bidding processes so that performance in relation to those factors, not just cost, determines who wins a contract. This would help to promote policy coherence and incorporate human rights into public procurement.

B. Relationship between small and medium-sized enterprises and large companies

39. Despite there being a large number of small and medium-sized companies, a few large conglomerates dominate the economy. The power imbalance between the former and the latter is striking: 3.42 million small and medium-sized companies make up 99 per cent of all businesses and account for 88 per cent of employment. About half of the small and medium-sized companies supply large companies and chaebol-affiliated conglomerates. A common concern in discussions with the Government and civil society representatives was the asymmetrical relationship between large companies and their small and medium-sized suppliers, where the big companies were able to set conditions and pressure small and medium-sized companies competing for contracts to offer lower prices. The Working Group learned about the differences in working conditions, salary scales and benefits of employees of large companies compared to those available to many in the workforce of small and medium-sized companies.

40. Measures to protect small and medium-sized companies against unfair practices by large firms are in place, including the Act on the Promotion of Collaborative Cooperation between Large Enterprises and Small-Medium Enterprises (enacted in 2006 and most recently amended in 2016).[44] It aims to develop policies "to facilitate win-win cooperation between large enterprises and small-medium enterprises", including related to exchanges of technology and human resources and narrowing the salary gap between large enterprises and small and medium-sized companies (art. 2). To incentivize corporations to provide support to small and medium-sized companies, the Government has created the win-win cooperation index,[45] whereby large enterprises are assessed annually by independent evaluators led by the Ministry of Strategy and Finance and win awards for good practice. However, these initiatives do not explicitly include human rights due diligence. This should be addressed and criteria related to human rights should be added.

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[41] See www.sseinitiative.org/wp-content/uploads/2015/05/Korea-Stock-Exchange-KRX-Commitment-Letter_f.pdf.

[42] See www.sustainability-indices.com/index-family-overview/djsi-family-overview/index.jsp and http://us.spindices.com/indices/equity/dow-jones-sustainability-korea-index-krw.

[43] See www.sustainability-indices.com/images/RobecoSAM-Corporate-Sustainability-Assessment-Companion.pdf.

[44] See https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=30349.

[45] See www.winwingrowth.or.kr/index.do (in Korean only).

C. Non-financial reporting

41. All of the companies that the Working Group met prepared annual sustainability reports. Several reports included references to human rights, some more explicitly than others. Most of the companies the Working Group met indicated that they followed the Global Reporting Initiative G4 Guidelines,[46] which include human rights criteria and refer to the Guiding Principles. However, the reports generally did not go into detail about steps taken to identify risks, and prevent and remedy human rights harm. The Working Group encourages all companies to highlight these aspects in non-financial reporting. A key tool for reporting on compliance with the Guiding Principles is the framework developed through the Human Rights Reporting and Assurance Frameworks Initiative.[47] The Working Group suggests that the Government should establish non-financial reporting requirements on human rights due diligence processes in line with the Guiding Principles and existing reporting standards. The Government could also use existing mechanisms to promote the Guiding Principles and responsible business conduct, e.g. the Korean Business Ethics Index, an annual review by the Center for Sustainability Management and the Ministry of Commerce, Industry and Energy, which evaluates ethical management in large companies,[48] the above-mentioned win-win cooperation index and the above-mentioned National Human Rights Commission's *Guidelines for Human Rights Management and Checklist*, which could be sent to private companies.

VII. Specific issues

A. Labour rights

42. Health and safety in the workplace was said by government representatives[49] to have been a problem in relation to large companies and increasingly also to small and medium-sized ones. The Occupational Safety and Health Act,[50] which aims to "maintain and promote the safety and health of workers by preventing industrial accidents and creating [a] comfortable working environment through establishing standards on occupational safety and health and clarifying where the responsibility lies", imposes several requirements on employers regarding the provision of safe workplaces. However, the Working Group heard that oversight and enforcement of these requirements were an issue and more should be done to facilitate the reporting of workplace incidents so that they could be properly investigated and remediation and prevention measures put in place. There was a high burden of proof on those seeking compensation for industrial accidents, e.g. victims must provide evidence of the presence of a risk factor and evidence of a high level of exposure. Victims must satisfy the burden of proof in order to receive compensation from the Occupational National Insurance for injuries suffered from hazardous working conditions.[51] The Act on Liability for Environmental Damage and Relief Thereof[52] came into force on 1 January 2016 and lessens the burden of proof for some victims. This is positive, but there is more to do to fairly treat workers who find it hard to prove wrongdoing by an employer. OHSAS 18000,[53] an international occupational health and safety management system specification, provides that, regardless of the contractual arrangement, the company where a worker is working is responsible for his or her health and safety. The Working Group did not hear of companies using this system and considers that companies should do so.

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[46] See www.globalreporting.org/information/g4/Pages/default.aspx.

[47] This framework is referred to as the "UN Guiding Principles Reporting Framework". See www.ungpreporting.org/.

[48] See http://csm.ips.or.kr/site/sm_english/wedo/kobex_01.aspx.

[49] Particularly from the Ministry of Employment and Labor.

[50] See www.moel.go.kr/english/poli/poliLaw_view.jsp?idx=264&tab=7.

[51] See Occupational Safety and Health Industrial Accident Compensation Insurance Act, available from www.moel.go.kr/english/poli/poliLaw_view.jsp?idx=230&tab=7.

[52] See http://elaw.klri.re.kr/eng_service/lawView.do?hseq=34926&lang=ENG.

[53] See http://certificationeurope.com/ohsas-18001-occupational-health-and-safety-management/.

Likewise, the Working Group did not hear of the ILO Sustaining Competitive and Responsible Enterprises practical training and in-factory counselling programme[54] being used. It improves productivity and working conditions in small and medium-sized enterprises and the Working Group thinks it would be useful for them.

43. As mentioned above, two fundamental ILO conventions that the Republic of Korea has not ratified are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The International Trade Union Confederation index[55] on workers' rights ranked the Republic of Korea as one of the worst for workers (assigning it the lowest rating of 5, defined as a country that has no guarantee of rights). Amnesty International[56] and the International Trade Union Confederation[57] have highlighted workers being detained and restricted from protesting. The Working Group heard concerns surrounding these issues, especially regarding the freedom for trade unions to operate. It heard about: "yellow unions" set up by companies that did not meet the international standard for freedom of association and collective bargaining; one union being treated as the representative of all the unions operating in a particular context; termination of a subcontracting agreement following establishment of a trade union;[58] and companies suing the trade union of a supplier where industrial action had been taken and deducting wages from workers who went on strike to pay for lost profits incurred by industrial action. Workers should not have to meet the financial cost resulting from the legitimate defence of their employment rights. All companies should seek to understand the reasons for industrial action and adapt their management practices, rather than punishing protesters. The international standard for freedom of association and collective bargaining should be adhered to in all instances.

B. Migrant workers and those in an irregular situation

44. The Working Group learned that temporary migrant workers were particularly at risk of business-related human rights abuse. Elements of the Employment Permit System for migrant workers seemed to contribute to this. Through bilateral agreements with 15 countries in the region, migrant workers are invited to enter on an E-9 visa for three years. While they are allowed to change employer up to three times during that period, the Working Group learned that, as they had no guarantee of finding alternative employment, it was often difficult for migrant workers to leave an abusive employer.[59] The estimated 214,000 unregistered migrants, of whom an estimated 49,300 became unregistered migrants with expired E-9 visas, find themselves in an even more vulnerable situation. Although unregistered migrants are allowed to stay and are covered by labour laws while cases concerning abusive labour practice or non-payment of salary are being processed, they are particularly vulnerable to human rights abuse.

45. The 22 per cent of the workforce who are employed as temporary workers[60] are also in a vulnerable situation. They are on average paid 38 per cent less than regular workers,

[54] See www.ilo.org/empent/Projects/score/WCMS_321117/lang--en/index.htm.

[55] "ITUC Global Rights Index: The world's worst countries for workers, 2016", available from www.ituc-csi.org/IMG/pdf/survey_ra_2016_eng.pdf.

[56] Amnesty International, "Stop arrest of trade union leaders and respect the rights of striking workers", 24 December 2013.

[57] International Trade Union Confederation, "Korea: Authorities targeting hundreds of trade unionists", 4 December 2015. Available from www.ituc-csi.org/korea-authorities-targeting.

[58] See www.tuacoecdmneguidelines.org/CaseDescription.asp?id=203.

[59] In 2015 during the 104th session of the International Labour Conference, the Conference Committee urged the Government to review and, if necessary, make adjustments to programmes to ensure appropriate protection of the foreign worker labour force. See www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3241944.

[60] OECD, *OECD Economic Surveys: Korea 2016* (Paris, May 2016), p. 42. Available from www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-korea-2016_eco_surveys-kor-2016-en#.WOyHJf7ovcs.

even if they have the same skills and perform similar work as regular workers.[61] As a 2016 OECD survey highlighted, the number of female workers in non-regular employment is particularly high: 40 per cent in 2015, compared to 26 per cent of men.[62] Several of the cases reported to the Working Group concerned temporary workers who had been assigned hazardous tasks without proper training. Lead companies must assume greater responsibility for the human rights risks facing workers across their supply chains.

C. Situation of women

46. The Working Group observed a significant absence of women at senior levels in companies. Statistics relating to the number of women at those levels were generally not available. The Ministry of Employment and Labor informed the Working Group that it was trying to deal with childcare issues as a means of addressing the low levels of women in leadership roles. The Working Group was struck that representatives of KOMSCO remarked that they "might address" the shortage of women at senior levels of the business "if the opportunity arose". Apart from the social and ethical issues raised, it does not make business sense to ignore half the workforce. The Working Group understands that women represent untapped labour and talent within the economy of the Republic of Korea. It heard that women left the labour force at a high rate when they married or had children and that highly educated women found it harder to find suitable employment than women with a lower standard of education, and found it difficult to re-enter the workforce after a career break. This finding echoes the Human Rights Committee's concluding observations on the country's fourth periodic report, which detailed concerns about "ongoing discrimination against women, including patriarchal attitudes and gender-based stereotypes concerning the role of women in the family and in society" and "the particularly small proportion of women in decision-making positions, the high rate of women in irregular employment and the markedly high wage gap between men and women".[63] The Committee recommended the development of "measures to eliminate existing patriarchal attitudes and gender stereotypes", intensification of "efforts to ensure equality between women and men in all spheres of both the private and public sectors, including through temporary special measures" and "measures to eliminate the gender wage gap, ensuring equal pay for work of equal value, including by promoting conditions to accommodate employees with families in regular employment, and eliminate discrimination in irregular employment".[64] The Working Group agrees that these recommendations should be implemented.

47. Furthermore, in October 2012 the Working Group on the Universal Periodic Review advised the country to: formulate a national strategy to promote gender equality so as to advance the status of women, combat violence and eliminate discrimination against women; take additional measures aimed at eliminating all forms of discrimination against women and at strengthening their situation and participation in all State institutions; and increase governmental efforts to ensure that women, in particular single mothers, can have access, as men do, without any discrimination, to employment, equal pay and matrimonial rights, especially following an inheritance or a divorce.[65] The Working Group on the issue of human rights and transnational corporations and other business enterprises supports these recommendations and looks forward to seeing how they have been implemented during the 2017 universal periodic review.

48. The Working Group notes that in 2015 only 17 per cent of the seats in the National Assembly were occupied by women.[66] It observes that the World Economic Forum's Global Gender Gap Report 2015[67] ranked the Republic of Korea at 115 (up two places from

[61] Ibid.
[62] Ibid., p. 47.
[63] See CCPR/C/KOR/CO/4, para. 16.
[64] See CCPR/C/KOR/CO/4, para. 17.
[65] See A/HRC/22/10, para. 124.26.
[66] See http://wdi.worldbank.org/table/1.5 and http://data.worldbank.org/indicator/SG.GEN.PARL.ZS?locations=KP.
[67] See http://www3.weforum.org/docs/GGGR2015/cover.pdf.

2014, triggered by progress across indicators on economic participation and opportunity). It is concerned about the situation of women in the workplace. It heard that women routinely faced issues relating to unequal pay and noted that a 2014 report produced by the National Human Rights Commission showed that 17.4 per cent of female workers reportedly received wages that fell below the minimum wage and 28.5 per cent of full-time workers received compensation below minimum requirements.[68] Gender equality in business was emphasized by the United Nations Secretary-General in his address to the Leaders Summit 2015. He remarked "if you really want to see dynamic growth, put more women in charge. Forbes Magazine did a study showing that the more women in the boardroom, the better the profits."[69] The Working Group thinks all businesses should take gender equality seriously as the economy and society benefit from a balanced approach to gender representation.

VIII. Role of local government

49. While visiting the metropolitan cities of Daejeon and Ulsan, the Working Group learned about the concept of "human rights cities", in which human rights standards and norms guided local government, civil society and private sector organizations. It heard that the metropolitan city of Gwangju, in the south-east of the country, was a human rights city[70] and that Daejeon (the country's largest research and development centre) and Ulsan (the country's centre of industry and production) were both led by mayors committed to emphasizing human rights in policymaking. The Working Group heard plans for Daejeon to hold a week of human rights-focused cultural activities during December 2016. It also learned that the Daejeon metropolitan government had adopted ordinances in relation to health and safety at work, the right to demonstrate as part of trade union activities and a living wage. The Working Group was pleased to learn that the National Human Rights Commission had signed, in October 2015, a memorandum of understanding with the Daejeon Metropolitan Office of Education as part of a plan to create a school environment that respected human rights[71] and that, on 30 June 2016, it had signed a memorandum of understanding with Daejeon metropolitan city in which they "agreed to cooperate on joint research on human rights issues in Daejeon, jointly develop and utilize human rights education contents and make multifaceted efforts to protect [the] human rights of underprivilege[d] and vulnerable classes".[72]

50. The Working Group learned that Ulsan had 6 human rights policy objectives and 75 human rights-related projects grounded in: support for trade unions through a tripartite committee based on a multi-stakeholder approach; and safety in the workplace to prevent industrial accidents. City representatives acknowledged weaknesses in the Ulsan area, such as: weak protections for irregular, temporary and foreign workers, the absence (due to a lack of funding) of an industrial accident treatment centre in Ulsan and the lack of a regional labour committee to deal with unfair labour practices. The Working Group was encouraged by this self-awareness and willingness to admit imperfection and considered it a good basis for future progress.

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[68] Human Rights Monitor South Korea, "NHRCK Report reveals gender inequality in the workforce", 24 March 2014. Available from www.humanrightskorea.org/2014/nhrc-report-reveals-gender-inequality-workforce/.

[69] See www.un.org/sg/en/content/sg/statement/2015-05-19/secretary-general%E2%80%99s-remarks-global-compact-network-republic-korea.

[70] See www.hurights.or.jp/archives/focus/section2/2010/03/koreas-city-of-human-rights-gwangju.html and www.uclg-cisdp.org/sites/default/files/Gwangju_Declaration_on_HR_City_final_edited_version_110524.pdf.

[71] "NHRCK signed an MOU with the Daejeon Metropolitan Office of Education", 14 October 2015. Available from www.humanrights.go.kr/site/program/board/basicboard/view?&boardtypeid=7013&menuid=002002005&paesize=10&searchcategory=policy&boardid=7001771.

[72] "NHRCK Signed an MOU with Daejeon Metropolitan City", press release, 4 July 2016. Available from www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&pagesize=10&searchcategory=policy&boardtypeid=7003&boardid=7001815.

51. In relation to the Dangjin case concerning the overdevelopment of thermal power plants and steel mills, affected community members reported that local authorities were unaware of the Guiding Principles and that it was hard to engage with them regarding their concerns. They felt abandoned to a life in hazardous and polluted conditions to facilitate the provision of cheaper electricity to the rest of the country. The Working Group urges central and local governmental authorities to consider how to provide a safe living environment for the people affected and to engage with them to address the perception that they have been sacrificed in favour of rapid industrialization for others elsewhere. It encourages all local authorities to embed the Guiding Principles in their activities.

IX. Access to remedy

A. State-based judicial mechanisms

52. Guiding Principles 26 and 27 make it clear that access to effective judicial mechanisms is at the core of ensuring access to remedy. Judicial remedies should be accessible and effective. Alleged victims of business-related human rights impact are usually in a weaker position than those accused of causing the impact. Access to legal advice and information for alleged victims is essential and the position of victims should be balanced to enable them to be in an equal position vis-à-vis the Government and business. The courts should be available to all those claiming to have suffered harm and judges should be aware of the Guiding Principles. The Seoul Central District Court case concerning the activities of POSCO Daewoo International in Myanmar is important as it shows how remedy can be sought in a "home State" by victims who find it difficult to access remedy in a "host State".

B. State-based non-judicial grievance mechanisms

53. While courts and administrative tribunals remain key, non-judicial mechanisms are important in ensuring access to remedy, in accordance with Guiding Principle 28. National human rights institutions are often empowered to examine complaints. The Working Group considers that the National Human Rights Commission's mandate should be widened to enable it to consider all business-related human rights harm caused by State-owned enterprises and private enterprises, not just issues relating to discrimination, as is currently the case.[73] While the National Human Rights Commission received an "A" rating in May 2016,[74] there is room to improve its resources and strengthen its mandate.

54. The OECD national contact point[75] is vital to the resolution of business and human rights issues. As the national contact point system incorporates the Guiding Principles through the OECD Guidelines for Multinational Enterprises,[76] it is a grievance mechanism to deal with cases concerning the Guiding Principles. While the national contact point of the Republic of Korea has been reformed by including independent experts and representatives from the Ministry for Environment and the Ministry of Employment and Labor, more progress is needed. The national contact point must be impartial and be perceived as such. The composition and the location of the national contact point need to retain the confidence of all stakeholders, including civil society and trade unions. The Working Group heard that some stakeholders did not have full confidence in it because past cases had been dismissed, its composition did not reflect all stakeholders, and its location at the Commercial Arbitration Board gave some stakeholders the impression that it was close to business. The Working Group considers that the national contact point's human and financial resources could be increased and it could be located elsewhere or

[73] See National Human Rights Commission Act, art. 19, available from http://elaw.klri.re.kr/eng_service/lawView.do?hseq=32353&lang=ENG.

[74] See www.ohchr.org/Documents/Countries/NHRI/ChartStatusNHRIs.pdf.

[75] http://mneguidelines.oecd.org/ncps/.

[76] See chap. 4, available from www.oecd.org/corporate/mne/48004323.pdf.

restructured within its current location to develop its competence, independence and authority. According to the commentary on the implementation procedures of the OECD Guidelines, national contact points can establish multi-stakeholder advisory or oversight bodies to assist them in their tasks.[77] The Working Group suggests that a multi-stakeholder advisory group would help the national contact point engage with critical voices. The OECD Ministerial Council at its 2015 meeting (for which the Republic of Korea was a Vice-Chair) called for voluntary peer reviews and the exchange of best practices by national contact points.[78] OECD Watch has called for the number of national contact point reviews to be accelerated.[79] The Working Group suggests that a peer review would be useful as a stronger national contact point could raise awareness, address cases concerning overseas business activities and set expectations.

C. Non-State-based grievance mechanisms

55. The Working Group heard about different types of operational grievance mechanisms operated by companies, although the understanding of the value of non-State grievance mechanisms was varied. While operational grievance mechanisms are not meant to substitute for judicial mechanisms, they can play an important role in providing early access to remedy for individuals or communities that are adversely affected by a business enterprise. They can provide a vital means for a company to become aware of matters within its business that it would otherwise not know about. They should not be used to preclude access to judicial mechanisms or undermine the role of legitimate trade unions.[80] Effective grievance mechanisms should be established by all companies operating domestically and overseas, either alone or in collaboration with others. This includes developing whistle-blower programmes and complaints processes. Companies should want to know about any issues in their business and take timely steps to find fair solutions.

X. Strengthening the policy framework

56. The Working Group was pleased to hear that the Government took the implementation of the Guiding Principles seriously and that work was under way to promote and protect human rights in relation to business conduct. However, there is a need for improved coordination among government agencies, and multi-stakeholder dialogue involving the Government, business and civil society. The Working Group urges the Government to develop a national action plan on business and human rights. The Human Rights Council has encouraged all States to do so.[81] Such a process presents a valuable opportunity to strengthen coordination and policy coherence and would help the Government to: identify areas of risk; decide which laws, regulations, policies and oversight should be strengthened; and determine how to improve access to remedy through State-based and non-State-based grievance mechanisms.[82] The Working Group stresses the importance of involving government agencies that deal directly with public and private companies in the process, and all sections of society. A national action plan should be based on the Guiding Principles and use the Working Group's guidance,[83] which states that national action plans "need to be developed in inclusive and transparent processes. Relevant stakeholders need to be allowed to participate in the development, and update, of the [plan] and their views need to be taken into account. Information needs to be shared transparently at all stages of the process".[84]

[77] Ibid., p. 78.
[78] See www.oecd.org/mcm/documents/ministerial-council-statement-2015.htm.
[79] See www.oecdwatch.org/publications-en/Publication_4303/.
[80] See Guiding Principle 26.
[81] Resolution 26/22.
[82] Guiding Principles 25-31.
[83] See www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.
[84] See www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

57. There is no national public mechanism mandated to prepare reports to and engage with international and regional human rights mechanisms (including treaty bodies, universal periodic review and special procedures), or to coordinate and track follow-up and implementation. Instead there are ad hoc mechanisms created to respond to specific reports.[83] A national mechanism for reporting and follow-up would develop the existing framework and strengthen policy coherence.

58. Engagement by all stakeholders is important in the implementation of the Guiding Principles as a multi-stakeholder approach is key to sound policy formulation. An active civil society and open media promote transparency and accountability in business operations. The Working Group encourages these stakeholders to continue pressing for the implementation of the Guiding Principles.

XI. Conclusions and recommendations

A. Overall remarks

59. **The Working Group welcomes the Government's commitment to the Guiding Principles and the topic of business and human rights. It emphasizes the importance of moving from commitment to action and embedding the Guiding Principles in all commercial and business activities within the Republic of Korea and overseas, including throughout companies' supply chains. It noted broad challenges in: workplace safety; supply chain management; business culture and the impact on women; overseas business activities; and disadvantages for migrant workers.**

60. **The Working Group urges the Government to commence a national action plan on business and human rights process and facilitate fulsome multi-stakeholder dialogue. The Working Group stands ready to assist with the development of policy and legislation on the basis of best international practice so that the country can deliver on its ambition to lead the region on business and human rights, and makes the following recommendations.**

B. Recommendations to the Government

61. **Develop a national action plan on business and human rights based on multi-stakeholder engagement and the Working Group's guidance.**

62. **Raise awareness and build capacity for civil servants and lawmakers on the obligations and responsibilities of the Government and business enterprises, including State-owned enterprises, to prevent and address adverse business-related human rights impact, in line with the Guiding Principles.**

63. **Provide guidance to companies, in particular small and medium-sized enterprises, about the corporate responsibility to respect human rights.**

64. **Provide guidance on the steps that lead companies should take to ensure that human rights are respected throughout their activities.**

65. **Provide guidance concerning companies' overseas activities and regulate such activities.**

66. **Underline the expectation in relevant policies that business enterprises must respect human rights throughout their operations and conduct human rights due diligence in relation to their domestic and international operations.**

[83] See OHCHR, *National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms* and *National Mechanisms for Reporting and Follow-up: A Study of State Engagement with International Human Rights Mechanisms* (HR/PUB/16/1 and Add.1).

67. **Enable open dialogue among the Government, business and civil society on business and human rights issues.**

68. **Strengthen the inclusion of the corporate responsibility to protect human rights in procurement in public procurement policies and contracts.**

69. **Require compliance with the Guiding Principles and the OECD Guidelines in relation to domestic and overseas activity, and highlight the good practice of those State-owned enterprises that comply.**

70. **Encourage Eximbank to implement safeguards against adverse human rights impact in relation to the projects it funds and consult with civil society about the safeguards.**

71. **Review access to remedy and suggest ways to strengthen judicial and non-judicial mechanisms to address business-related human rights harm.**[46]

72. **Ensure that people whose human rights may be negatively affected by business activities receive information, including legal advice, so they can defend their rights.**

73. **Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.**

74. **Train lawyers and judges to improve their awareness of the Guiding Principles in cases concerning companies established in the Republic of Korea.**

75. **Establish a national mechanism for reporting and follow-up, as suggested by OHCHR.**[47]

76. **Increase the independence and visibility of the national contact point as well as its human and financial resources. Expand its scope to give it a clearer and more ambitious mandate.**

77. **Monitor effectively workplace violations of the Occupational Safety and Health Act and clarify to companies the health and safety standards they must adhere to, and take enforcement action against companies where appropriate.**

78. **Fund an industrial accident treatment centre in Ulsan.**

79. **Broaden the National Human Rights Commission's mandate to enable it to consider all human rights harm caused by private enterprises, not just discrimination issues.**

C. Recommendations to businesses

80. **Ensure that all levels of their organization (including policy and site/operation levels) know and implement the Guiding Principles, including in relation to the entire value chain and overseas activities.**

81. **Comply with the responsibility to respect human rights by adopting a human rights policy, and carrying out human rights due diligence to identify, prevent, mitigate and account for how adverse human rights impact is addressed.**

82. **Conduct meaningful consultations with all those actually or potentially affected by adverse human rights impact and provide timely and complete information about matters affecting them.**

83. **Address gender inequality in the workplace, and consider how human rights risks affect women, children and men differently.**

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[46] See A/HRC/32/19.

[47] See OHCHR, *National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms*.

84. Address human rights risks facing migrant workers and persons with disabilities.

85. Develop and run operational grievance mechanisms, consistent with the effectiveness criteria in Guiding Principle 31, to identify and address adverse impact.

86. Participate in developing a national action plan on business and human rights.

87. Engage with the United Nations Global Compact Network Korea and business associations, to promote understanding of, and learn from, experiences of implementing the Guiding Principles.

88. Engage fully with civil society to listen to concerns and seek information about human rights risks and poor practices throughout the supply chain.

89. Create an environment in which victims can speak openly and obtain an appropriate remedy.

90. Better address workplace safety issues in accordance with existing health and safety standards.

D. Recommendations to civil society

91. Continue to raise awareness around the different obligations and responsibilities of the State and business enterprises under the Guiding Principles to prevent and address adverse human rights impact related to the operations of business enterprises.

92. Continue to raise the cases of victims and human rights defenders at the national and international levels.

93. Engage in a multi-stakeholder process to contribute to the development of a national action plan on business and human rights, and campaign for full participation of all stakeholders.

United Nations A/HRC/35/32/Add.2

General Assembly

Distr.: General
27 April 2017

Original: English

Human Rights Council
Thirty-fifth session
6-23 June 2017
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Mexico

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Mexico from 29 August to 7 September 2016.

GE.17-06772(E)
1706772

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Mexico*

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* Circulated in the language of submission and Spanish only.

I. Introduction

1. Further to Human Rights Council resolutions 17/4 and 26/22, the Working Group on the issue of human rights and transnational corporations and other business enterprises, represented by two of its members, Pavel Sulyandziga and Dante Pesce, visited Mexico from 29 August to 7 September 2016, at the invitation of the Government. The purpose of the visit was to assess the efforts made to prevent and address adverse human rights impacts of business-related activities, in line with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.[1]

2. During their visit, the experts met with communities in Mexico City and the States of Mexico, Oaxaca, Jalisco and Sonora. The Working Group met with government officials from the ministries responsible for foreign affairs; the interior; the environment and natural resources; the economy; energy; labour; tourism; agriculture, livestock, rural development, fisheries and food; communications and transport; and finance and public credit. It also met with officials from the national commissions for the development of indigenous peoples and on water, on hydrocarbons, on food safety and quality, on the safety of genetically modified organisms and on aquaculture and fisheries; the agencies for security, for energy, for the environment and for airports and auxiliary services; the Federal Authority for the Development of Special Economic Zones; the National Fund for Tourism Development; the General Prosecutor's Office; the office of the Federal Attorney for Environmental Protection; the National Council for the Prevention of Discrimination; and the working group for developing the national action plan on business and human rights. The Working Group also met with officials of the States of Oaxaca, Jalisco and Sonora.

3. The Working Group also met with representatives of the National Human Rights Commission and the state human rights commissions of Oaxaca, Jalisco and Sonora; members of Congress (Chamber of Deputies and Senators); representatives of the National Supreme Court of Justice; Nacional Financiera, an industrial development bank; the Mexican stock exchange; the confederation of chambers of industry of Mexico, United Nations agencies in Mexico; representatives from a range of business enterprises, including Grupo Bal, Grupo Bimbo, Eólica del Sur, CEMEX, Grupo México, Goldcorp, the Federal Electricity Commission, and Petróleos Mexicanos; representatives of civil society organizations; and human rights defenders and members of affected communities.

4. The Working Group thanks the Government for its support and facilitation of the visit, and its willingness to engage in a discussion on current initiatives and challenges faced in aligning policies and practices with the Guiding Principles. It also thanks the organizations, communities and representatives of business enterprises with whom it met for their openness and willingness to engage in a dialogue.

II. General context

5. Over the past years, international and national organizations and human rights mechanisms have drawn attention to serious human rights challenges facing Mexico. The country experiences high levels of violence, insecurity and impunity, compounded by persistent problems of corruption and organized crime.[2] The country also faces high levels of poverty and inequality. Almost half of the total population of 119.5 million lives in poverty.[3] There have been important legislative developments and public policies to address these human rights challenges, including recent initiatives to better align policies and practices with the Guiding Principles on Business and Human Rights.

6. As underlined in the Guiding Principles, apart from the obligation of Governments to effectively protect against business-related human rights violations, business enterprises

[1] A/HRC/17/31, annex.
[2] See, for example, A/HRC/32/39/Add.2 and A/HRC/28/68/Add.3.
[3] See HRI/CORE/MEX/2017, para. 39.

have a responsibility to respect human rights, independent of the State's ability to fulfil its own human rights obligations.

7. The Working Group observes that one main concern about business-related human rights abuse relates to inadequate human rights due diligence on the part of the Government and business enterprises in the design and implementation of large-scale projects, and in providing adequate reparation for harm caused. These are mainly projects in the sectors of mining, energy, construction and tourism, often affecting indigenous communities. Other main concerns relate to labour rights and the capacity of the Government to effectively oversee compliance with labour and environmental standards. The urgency to attract investment, insufficient safeguards and a lack of capacity to enforce existing legislation creates an environment in which human rights can be abused with impunity.

8. The information presented by affected communities indicates that when human rights abuses occur, raising grievances is not easy and often results in retaliation, while access to remedy can be difficult to achieve. These trends are reflected in a document submitted to the Working Group by a coalition of more than 100 non-governmental organizations, summarizing over 60 specific cases of alleged business-related human rights violations in different regions of Mexico.[4] A recurrent concern raised was that the State was captured by corporate interests and that policy frameworks and commitments were not implemented in practice.

III. Legislative and policy framework

9. Mexico is a federal republic made up of 31 states and Mexico City, with each entity of the republic having its own constitution. The country has a solid legal framework for the protection of human rights. Importantly, following the constitutional reforms of 2011, article 1 of the national Constitution establishes that all persons shall enjoy the human rights recognized in the Constitution and in the international treaties to which Mexico is a party.

10. The Constitution also provides for the *amparo* procedure, by which private individuals can challenge before a federal judge the conformity of decisions of public authorities with constitutional provisions. As discussed further below, the *amparo* procedure is being actively used in cases of adverse business-related human rights impacts.

11. Mexico is party to all nine core international human rights treaties, and has ratified or acceded to seven of the nine optional protocols.[5] The country reports regularly to the human rights treaty bodies, and has issued a standing invitation to the special procedures of the Human Rights Council. Furthermore, since 2002, at the invitation of the Government, the Office of the United Nations High Commissioner for Human Rights has had an office in Mexico.

12. Mexico has ratified seven of the eight International Labour Organization (ILO) fundamental conventions, covering the freedom of association and the right to organize, equal remuneration, abolition of forced labour, abolition of child labour and elimination of discrimination in employment and occupation.[6] It has ratified 1 of the 4 ILO governance conventions, on tripartite consultation,[7] and 71 of 177 ILO technical conventions, including the Indigenous and Tribal Peoples Convention, 1989 (No. 169).

13. Mexico is party to the main human rights instruments of the Inter-American system and recognizes the competency of the Inter-American Court on Human Rights.

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[4] See https://business-humanrights.org/sites/default/files/documents/Informe_Mx_Empresas_DDHH_68_0.pdf.

[5] See www.ohchr.org/EN/Countries/LACRegion/Pages/MXIndex.aspx.

[6] Mexico has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

[7] Mexico has not ratified the Labour Inspection Convention, 1947 (No. 81), the Employment Policy Convention, 1964 (No. 122) or the Labour Inspection (Agriculture) Convention, 1969 (No. 129).

14. The Government's National Development Plan 2013-2018 specifies as a key policy objective to guarantee the respect and protection of human rights and the eradication of discrimination (goal 1.5). This goal is also reflected in constitutional reforms relating to transparency and access to public information and in new laws, such as the Law for the protection of human rights defenders and journalists and the General Law on victims.

15. The National Human Rights Programme 2014-2018 includes, for the first time, a specific reference to the promotion of human rights in policies and activities of business enterprises.

IV. Awareness of business and human rights

16. The Working Group notes that significant efforts are needed to raise awareness among business enterprises about their responsibility to respect human rights and exercise human rights due diligence, as set out in the Guiding Principles on Business and Human Rights. Increasingly, major companies publish annual non-financial sustainability reports. However, the Working Group did not see any examples of such reports demonstrating that human rights due diligence was integrated into a company's operations. To the extent that such reports include references to human rights, they typically refer to company policies in areas such as discrimination in the workplace and forced and child labour, but do not indicate how companies have sought to identify and prevent adverse human rights impacts, let alone address specific cases of such adverse impacts.

17. Several companies are members of the local United Nations Global Compact network and subscribe to the 10 Global Compact principles covering human rights, labour, the environment and anti-corruption. The Mexican Global Compact network actively disseminates information on these issues to its members, including through a number of specific guidance documents on business and human rights.

18. The Working Group was pleased to see that the National Human Rights Commission had taken the Guiding Principles fully on board. The Commission has published a booklet on the Guiding Principles and was actively seeking to raise awareness among businesses about the importance of human rights due diligence.

19. The Working Group observed some awareness about the business and human rights agenda among government agencies, including references to the Guiding Principles in some public information material. However, the Government has yet to provide clear guidance and set out clear expectations for business enterprises about their responsibility to respect human rights throughout their operations, both in Mexico and abroad. Likewise, the Government currently does not have clear guidance and policies to ensure that State-owned enterprises lead by example[8] and that the State uses its leverage to influence business conduct through its public procurement practices.

20. Another area requiring further attention by the Government is the policies and lending practices of national development banks. Such banks play an important role in providing financing for various development projects in Mexico. The Working Group met with representatives of one of the country's six development banks, Nacional Financiera. While engaged in a number of programmes aimed at the economic empowerment of women and youth, it was clear that Nacional Financiera has yet to integrate a human rights due diligence approach. Overall, the Working Group found that the banking sector in Mexico had, to date, paid little attention to its human rights responsibilities.

21. The Working Group noted with interest that, since 2011, the Mexican stock exchange has operated the Sustainable Price and Quotations Index, where 30 companies are listed. In 2014, the Mexican stock exchange joined the Sustainable Stock Exchanges Initiative.[9] The Working Group noted that there was currently no standard format for sustainability reporting, and that a guide for companies was being finalized.

[8] A/HRC/32/45.

[9] See www.sseinitiative.org/.

V. Human rights due diligence in the context of development projects

22. From the information received about the cases of alleged business-related human rights abuse, one recurrent theme is inadequate consultation with individuals and communities affected by major development projects. In meetings with public officials, the Working Group found evidence of a growing awareness of the deficiencies of past practice and of the need for a new approach of improved consultation and transparency, also prompted by civil society advocacy and the work of national human rights commissions.

23. The Working Group was able to discuss some of the cases in more depth with the involved stakeholders: Federal and State authorities, business enterprises, affected communities, representatives of the judiciary, including the Supreme Court, and national and state human rights commissions. The cases provide useful insights into main issues and challenges faced and into the measures that the Government and business enterprises need to take to better prevent, mitigate and remedy adverse business-related human rights impacts.

A. Wind-farm project

24. In Oaxaca, the Working Group heard the views of the various parties concerning a wind-farm project in the municipalities of El Espinal and Juchitán de Zaragoza implemented by the company Energía Eólica del Sur. Following the pattern of several similar cases, an *amparo* order issued by a federal court in December 2015 had brought this large development project to a halt. In this case, prior to the *amparo* order, a consultation process had been undertaken with the aim of obtaining the consent of the affected indigenous peoples over a two-year period. The consultation process had been overseen by a technical committee led by the Ministry of Energy and composed of competent federal institutions, together with the National Commission for the Development of Indigenous Peoples, the local authorities of the State of Oaxaca and the City Council of Juchitán de Zaragoza. After the consultation process, a group of members of the indigenous community of Juchitán de Zaragoza still did not agree to the project going ahead and filed an *amparo* lawsuit.

25. In August 2016, the *amparo* decision was revised and the project was allowed to go forward, as the consultation process was found to be lawful and in conformity with international standards. A group of the affected indigenous community of Juchitán de Zaragoza continued to resist the decision and 1,166 community members are seeking the intervention of the Inter-American Commission on Human Rights. There are reports of acts of intimidation against the community leaders who resist the project.

26. The company underlined to the Working Group that the Government had carefully undertaken the consultations with indigenous communities, in line with the standards set out in ILO Convention No. 169. Furthermore, the Ministry of Energy informed the Working Group that the communities had actively participated in the design and implementation of the protocol for the consultation process, since the objective was to design a project that could be accepted by the affected communities.

27. Some indigenous peoples the Working Group met expressed the view that the whole process of consultation was flawed, as windmill farms had already been set up in the region as part of other, previous projects unrelated to that of Energía Eólica del Sur, without any prior consultation. On the other hand, representatives of state authorities expressed frustration that the *amparo* order had delayed the project, with one state official commenting that the federal judge who had ordered the *amparo* did not appreciate the importance of the energy projects for the economic development of the state.

28. Further wind power projects are being planned in the same region, as part of the goal to produce from renewable sources 35 per cent of the energy consumed in Mexico by 2024, and the Working Group urges the authorities to continue efforts to ensure adequate prior consultation also for those new projects.

B. Cultivation of genetically modified soybeans

29. In another case involving Maya communities in Campeche and Yucatán, federal authorities granted a company permission to cultivate transgenic soybeans without consultation with the indigenous communities concerned. Among the grievances of the local communities were concerns about contamination of water sources by herbicides, deforestation and the impact on the traditional apiculture of the Maya community. This case alone has been subject to six separate *amparo* orders by three different district courts. The Supreme Court granted a suspension ordering a proper consultation with the indigenous communities, which was also supported by the National Human Rights Commission (recommendation 23/2015).

30. The authorities have shown a commitment to complying with this ruling, and the consultation is still in process. However, despite the suspension, there have been reported cases of illegal distribution and cultivation of genetically modified soybeans. In discussing lessons learned from the case with the Ministry of Agriculture, Livestock, Rural Development, Fisheries and Food, it was pointed out that there was a need for clear guidelines as to the processes of public consultations and consultations with indigenous peoples in the context of such development projects.

C. Toluca-Naucalpan highway project

31. The Working Group visited the Otomí-Mexica indigenous community in San Francisco Xochicuautla, State of Mexico, whose members have been resisting an expropriation order that was issued in 2012 without any prior consultation for a project to construct a highway through their ancestral lands. The community has been engaged in a sustained legal dispute with state authorities. In 2013, a federal judge issued an *amparo* ruling requesting the temporary suspension of the construction of the highway. The community has also petitioned the National Human Rights Commission and the Inter-American Commission on Human Rights; both institutions have requested the State of Mexico to adopt preventive measures to protect the Otomí-Mexica indigenous community.[10]

32. There are several reports of harassment and intimidation of community members who have protested against the project. In June 2015, 21 members of the indigenous community of San Francisco Xochicuautla began to receive protection under the national mechanism for the protection of human rights defenders. In September 2015, a risk assessment concluded that the community members were exposed to extraordinary risk, considering that the aggressions they had been subjected to by employees of the construction company commissioned to construct the highway had put their life at risk.

33. In February 2015, an *amparo* ruling by a federal judge (*amparo* No. 771/2015) ordered the definitive suspension of the project. Yet, despite these requests and in disregard of the judicial suspension, construction of the highway continued. On 11 April 2016, the construction company, accompanied by some 800 state police officers, destroyed property, including the house of one of the persons leading the opposition against the highway project — 1 of the 21 community members receiving protection under the national mechanism for the protection of human rights defenders.

34. This incident received considerable media attention, and led the state Government to halt the construction and to engage in further consultations with the community, mediated by the National Human Rights Commission. The Working Group also notes recommendation No. 56/2016, issued by the National Human Rights Commission in December 2016, concerning violations of the right to prior, free and informed consultation of the indigenous communities affected by the Toluca-Naucalpan, and calls on the authorities to ensure implementation thereof in collaboration with the affected

[10] Inter-American Commission on Human Rights, PM 277/13 of 11 May 2016, Members of the Otomí-Mexica indigenous community of San Francisco Xochicuautla, Mexico.

communities. The Working Group received worrying information that an assembly of the community had been interrupted by armed state police officers on 3 March 2017, and calls on the Government to avoid the recurrence of these types of events.

35. The Working Group also sought to talk to representatives of the construction company Grupo Higa, but did not receive any reply to its requests. The Working Group notes that this was the single case of a company not being responsive to its request for direct interaction, and that it was difficult to find more information about the policies of Grupo Higa, as it did not have a functioning website.

D. Aqueduct project

36. In Sonora the Working Group met with state authorities and members of the Yaqui indigenous community who have been disputing a project promoted by the State of Sonora to construct an aqueduct that was authorized in 2011 by the Ministry of Environment and Natural Resources. The case was subject to a ruling by the Supreme Court in 2011, in which the Court requested that adequate consultations be held with the affected communities, as well as to recommendations of the National Human Rights Commission (No. 37/2012 and No. 43/2015), in which the Commission also expressed concern about cases of repression against human rights defenders from the Yaqui community. The security situation in the community is alarming, with reports of several community members having been intimidated, detained, attacked and even (forcibly) disappeared, which has led several national and international human rights bodies, such as the Inter-American Commission on Human Rights, the Committee on Enforced Disappearances and the national mechanism for the protection of human rights defenders, to take action related to the case.

37. State government officials informed us that the change of the state Governor in September 2015 had led to a new working relationship with the Yaqui indigenous community. Soon after taking office, the new Governor released Yaqui leaders who had been imprisoned and convened a meeting with Yaqui representatives. However, the Working Group has received information about further tensions after its visit, including violent confrontations on 21 October 2016 between members of the Yaqui tribe related to a dispute about whether to allow a gas pipeline to cross their traditional lands.

E. General observations

38. A general feature of the cases presented to the Working Group is a lack of human rights due diligence in the form of adequate prior consultation with affected communities, leading to "lose-lose" situations of social conflict, human rights abuse, reputational damage for companies and financial losses for investors. As the Guiding Principles underline, adequate consultation with communities affected by business operations is a central aspect of human rights due diligence, as it is of critical importance to identify risks to human rights before undertaking projects as well as concerns and grievances that may arise.

39. Several of the business enterprises the Working Group spoke with underlined that consultation with affected communities was not their responsibility, but rather the competence of Government authorities. In this regard, the Working Group would like to stress that business enterprises have a responsibility to respect human rights independent of States' abilities and/or willingness to fulfil their own human rights obligations. Business enterprises are expected to undertake adequate human rights due diligence, to prevent and address adverse human rights impacts, including impacts caused by others they are directly linked with through their activities, products and services (their business relationships), which can include government entities.

40. With regard to indigenous peoples, their right to be consulted is enshrined in article 2 (B) of the Constitution. Moreover, in a ruling of 2013, the Supreme Court underlined that public authorities have an obligation to consult with indigenous peoples before taking any

action or measure that is likely to affect their rights and interest.[11] Finally, the Government of Mexico is bound by standards of international human rights instruments in this field, including ILO Convention No. 169.

41. In response to multiple cases of projects initiated without adequate consultation with affected indigenous peoples, the National Human Rights Commission in July 2016 issued recommendation No. 27/2016 on the right to prior consultation of indigenous peoples and communities. In the recommendation, the Commission underlines that in accordance with ILO Convention No. 169, consultation must be prior (to the authorization of a project), informed (providing clear and complete information about possible effects and risks), in good faith (so that it is not merely a process to legitimate a predefined outcome) and culturally adequate. Also, the consultation should be conducted with the objective of obtaining free, prior and informed consent.

42. The Working Group welcomes steps taken to clarify to relevant government authorities their obligation to undertake meaningful consultations with indigenous communities, notably the protocol adopted in 2013 by the National Commission for the Development of Indigenous Peoples on the implementation of consultations with indigenous peoples in conformity with ILO Convention No. 169.

43. The Working Group would also like to stress that human rights due diligence requires consultation not only with indigenous peoples, for which specific human rights standards apply, but also with all other affected communities. This approach is also outlined, for example, in the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector,[12] which underlines the role of companies in avoiding and addressing adverse human rights impacts.

VI. Human rights impacts related to industrial pollution

44. The Working Group visited the Sonora River, in the State of Sonora, and the Santiago River, in the State of Jalisco, to look into two cases of severe environmental pollution caused by industrial activities. It met with inhabitants, civil society and community representatives, as well as representatives of companies and state authorities, in order to assess what measures had been taken to identify and prevent human rights risks and to mitigate adverse human rights impacts of the project.

A. Sonora River

45. The case of the Sonora River is considered to be the largest environmental disaster in the history of the country's mining industry. On 6 August 2014, Buenavista del Cobre, a subsidiary of Grupo México, spilled 40,000 m^3 of copper sulphate and heavy metals into a stream leading to the Sonora River. This environmental disaster affected approximately 22,000 people directly, including through its impact on livestock and crops, and 250,000 people indirectly, from seven municipalities located on the banks of the Sonora River: Arizpe, Banamachi, Huepac, Aconchi, San Felipe, Baviácora and Ures.

46. The Ministry of Environment and Natural Resources and the office of the Federal Attorney for Environmental Protection found 55 irregularities in the activities of the mining company, and the company was given a fine of 23 million pesos (about US$ 1.8 million). The company also collaborated with the Government in establishing a trust fund of 2 billion pesos in order to ensure redress, reparation and compensation for economic and environmental damages and health problems caused in the communities affected by the spill.[13] In addition, Grupo México committed to take a number of measures, including

[11] See http://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneral.aspx?ID=2004170&Clase=DetalleTesisBL.

[12] Available from https://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm.

[13] See www.fideicomisoriosonora.gob.mx/fideicomiso.html.

installing 28 water treatment plants with technology to filter out heavy metals and building a clinic to treat those whose health was affected.

47. The state human rights commission informed the Working Group that it had no mandate to investigate the matter, since issues related to environmental contamination fell under federal jurisdiction. However, the state human rights commission had requested the office of the Federal Attorney for Environmental Protection to file a criminal complaint against the company, but there had been no follow-up. The Federal Attorney's Office, in turn, informed the Working Group that it had filed a criminal complaint with the Attorney General's Office, and had assisted in providing expert advice and opinions, but that the follow-up of criminal cases was the responsibility of the Attorney General's Office.

48. Affected communities raised a number of concerns related to a lack of consultation about the use of the trust fund; a perception that compensation was determined arbitrarily, for example compensation was provided up to a maximum number of livestock, irrespective of the number of livestock affected; a lack of transparency about the level of contamination and plans for the recovery of the river; and the non-fulfillment of the company's commitments to build water treatment plants and a health clinic.

49. The state authorities also said that Grupo México had not fulfilled its obligations, confirming that only 1 of the promised 28 water treatment plants had been built and it was not fully functional, while the health clinic had never been completed, as the Working Group was able to confirm during its visit to the site.

50. The Working Group raised these issues with representatives of Grupo México, and was told that the reason why construction of the treatment plants and the clinic had not been completed was that it would have been irresponsible to do so given that the municipal authorities did not have the capacity to operate them. They stressed how the company had voluntarily agreed to the trust fund and to include claims for compensation from people along 250 km of the river, rather than the 50 km that was established by law. They expressed regret that affected communities considered they were not adequately informed, but stressed that it was the federal Government's role to provide such information, and that some of the information was confidential given the ongoing mediation process.

51. The Working Group underlined that there was significant room for improvement with regard to dialogue, communication and transparency, and encouraged the company to pay more attention to critical voices. The Working Group considers that there is a need for the Government to provide clear information to the population and guidance for the determination of compensation.

B. Santiago River

52. In Jalisco the Working Group considered the case of the Santiago River, deemed the most polluted river in Mexico. Since 2002, discharge from over 300 companies established in the Ocotlán-El Salto industrial corridor has been flowing into the river. One of the most polluted parts of the river flows through the municipalities of Juanacatlán and El Salto, located 35 km from the city of Guadalajara. More than 300,000 inhabitants live in the municipalities, but the affected population could include the 7.5 million people living in the watershed of the river. The main effluents are derived from the metal mechanics and metallurgy, chemical-pharmaceutical, electronics, automotive and food and beverage industries. A study conducted by the Mexican Institute of Water Technology found a total of 1,090 toxic substances, chemicals and metals in the river, mainly from industrial sources. The view of the river covered by foam and the smell of the strong gases and odours that dispersed as the water flowed over the El Salto waterfall made a strong impact. Local doctors cited an increase in the incidence of different health problems, including leukaemia, miscarriages and congenital birth defects.

53. In the case of the Santiago River, the affected communities prompted the creation of "dialogue tables" to find solutions with the federal and state governments. Communities expressed frustration that their concerns were not being heard or resulting in any response.

Despite the obvious exposure to hazardous industrial contamination, the burden of proof is on victims who are suffering health impacts.

54. State authorities said they were very much aware of the problem, but emphasized that it was a federal matter, and that repeated efforts had been made to set up a working group with federal authorities to discuss a plan to rehabilitate the river. They also underlined that it was the competency of federal and municipal authorities to oversee the compliance with environmental standards.

55. As in the case of the Sonora River, the distribution of responsibilities and competencies among agencies at the federal, state and municipal levels appeared to be an obstacle to effective oversight. Also, as in the case of the Sonora River, the federal authorities were seen to not assume their responsibilities, which is limiting corrective actions.

C. Environmental and social impact assessments

56. The Working Group identified a need to strengthen oversight and assessment of environmental and social impacts to avoid or mitigate the actual and potential adverse impact of business activities on human rights. The State needs to incentivize and require human rights due diligence by business enterprises, especially when the nature of business operations or operating contexts pose significant risk to human rights. The human rights due diligence process should assess actual and potential impacts and seek to prevent or mitigate adverse human rights impacts. The process should include assessing, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed.

57. The General Law on Ecological Balance and Environmental Protection of 1988 and its regulation on impact assessment regulate the obligation for businesses to conduct environmental impact assessments of their activities. These assessments need to be prepared according to specific guidelines. While focusing primarily on impacts on the physical environment, they also address certain demographic and sociocultural aspects. One requirement is that the promoter of a project must publish an extract of the project in a newspaper that is widely circulated in the relevant region, so that interested parties can know about the project and how it might affect them. In cases of projects that could have serious impacts on the environment or on public health, the Ministry of Environment and Natural Resources, in coordination with local authorities, may decide to organize a public information meeting.

58. The Working Group learned about the limited capacity of the relevant authorities to carry out inspections to control environmental pollution by business enterprises. The office of the Federal Attorney for Environmental Protection is responsible for inspecting and supervising 200,000 potentially polluting companies, with a view to avoiding and controlling environmental pollution, but has only 300 inspectors. The Working Group was informed that there is a restriction on the number of days inspectors can travel to conduct in situ visits, and that such visits are often announced 24 hours in advance, which could give time to clean up operation sites before inspections.

59. The Working Group observed that the office of the Federal Attorney for Environmental Protection lacks the means to undertake effective inspections, while local authorities have no authority to do so; consequently, the operations of companies may not be properly monitored. A representative of one of the businesses operating along the Santiago River explained to the Working Group that the current lack of effective inspections was a problem for those companies that diligently complied with regulations and did not contribute to the pollution. Authorities should engage with responsible business leaders to find practical solutions and prevent impunity.

60. The Working Group was encouraged to learn about new legislation, in the framework of the reform of the energy sector, that incorporates the concept of sustainable development. The Electricity Industry Law and Hydrocarbons Law, both of 2014, include a

requirement for businesses to undertake social impact assessments with a human rights-based approach in the realization of their projects.

61. The Electricity Industry Law establishes that electricity infrastructure projects must provide a social impact assessment (art. 120), and should comply with sustainability principles and respect the human rights of local peoples and communities (art. 117). The law also specifies that the Ministry of Energy should inform businesses about the presence of social groups in situations of vulnerability in areas of planned projects (art. 118), and that the Ministry should carry out the necessary consultations to safeguard the interests and rights of communities and indigenous peoples (art. 119).

62. It was not clear to the Working Group to what extent social impact assessments included due diligence on human rights impacts, and it noted the weak capacity to evaluate the impact assessments that are presented by companies. Representatives of corporations who met with the experts indicated that expectations set by the Government were very general and unclear. Diligent companies would welcome more clarity and a reinforcement of the capacity of government authorities to oversee and support social and environmental impact assessments.

VII. Specific issues and groups

A. Labour rights

63. With regard to labour rights, the Working Group learned about some of the main challenges faced, including the precarious situation of temporary contract workers, the lack of access to social security, the low wages and a minimum wage that is currently set at a level that does not cover the basic food basket and is insufficient to allow workers to support themselves and their families. Another issue raised by Government and civil society representatives was the weak capacity of the labour inspectorate to effectively monitor compliance with labour standards. Equally, effective monitoring is made difficult by the fact that some 57.2 per cent of the workforce are employed in the informal sector.[34] The Ministry of Labour and Social Welfare informed the Working Group that between 2013 and June 2016 the number of labour inspectors had increased from 776 to 926.

Trade unions

64. During its visit the Working Group heard several concerns expressed about restrictions on freedom of association of workers. Similar concerns have repeatedly been raised by the Committee of Experts on the Application of Standards of the ILO about non-compliance with the ILO Freedom of Association and Protection of the Right to Organize Convention.[35]

65. One main concern relates to the practice of "protection contracts": collective agreements signed between an employer and a non-representative union leader, often without the participation of the workers and without their knowledge. These kinds of contracts have been widely used by employers to fix wages and conditions of work. In this regard, the Working Group notes that in addition to the ILO and Mexican independent trade unions, a number of business enterprises have also raised concerns with the Government about a lack of respect for workers' rights to freedom of association, including in a joint letter of 22 September 2015 sent to the President of Mexico by eight international apparel brands.

[34] See http://www3.inegi.org.mx/sistemas/temas/default.aspx?s=est&c=25433&t=1. See also www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_245619.pdf

[35] See, for example, www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3241939

66. The Working Group welcomes that, in response to concerns raised, a reform of the federal labour law was presented to the Senate in April 2016 and approved by Congress in February 2017.

Temporary workers

67. The Working Group also heard about the rise of temporary jobs, resulting in a worsening of wages and working conditions. While under the labour law companies cannot outsource to temporary employers work that is a core function to a company, there is evidence that this is not respected in practice. A report on working conditions in the electronic industry in Mexico found that about half of the workers of the sector were outsourced and were hired through temporary agreements of 1 to 12 months.[16]

Agricultural day labourers and migrant workers

68. Another concern is the situation of day labourers (*jornaleros*) and farm workers (*peones*) working on large plantations. Their dramatic situation is borne out by the official statistics: out of a total of 2.42 million day labourers and farm workers (making up 44 per cent of the total agricultural workforce), more than 800,000 (34 per cent) receive no remuneration, while another 750,000 (31 per cent) only earn up to the minimum salary.[17]

69. A significant part of the agricultural day labourers are migrant workers, a majority of which migrate from southern states to the north, following the harvest seasons. The National Human Rights Commission has documented several cases of abusive working conditions of migrant day workers, who often travel with their children.[18] The Working Group learned that the Ministry of Agriculture, Livestock, Rural Development, Fisheries and Food, together with other government agencies, has initiated an intersectoral effort to strengthen oversight of labour conditions of agricultural day workers. Also, the Ministry of Labour and Social Welfare informed the Working Group about a protocol on the working conditions of agricultural workers, which serves as a guide in labour inspections for verifying that employers respect the rights of workers.

70. The Ministry of Labour and Social Welfare reported that, from September 2015 to June 2016, 121 labour inspections had been carried out in agricultural fields, where 7,211 women and 15,587 men were employed. Those inspections revealed 962 cases of violations of labour standards.

Occupational safety and health

71. The Working Group learned about the programme on self-management in health and safety at work, aimed at incentivizing companies to establish and operate systems that ensure occupational safety and health protection in line with national and international standards. It was informed that 5,284 workplaces participate in the initiative, of which, in 2016, 1,635 had been certified as "Safe Companies". According to the Ministry of Labour and Social Welfare, the accident rate in the certified companies in 2016 was 0.85 accidents per 100 workers, which was 1.55 percentage points below the national average (2.4 accidents per 100 workers).

III. Child labour

72. In Mexico, child labour remains a major concern. According to national statistics (2015 data), some 2.48 million children in Mexico are involved in an economic activity, out of whom more than 1 million (41.1 per cent) are below the age of 15, and 900,000 (36 per

[16] Centro de Reflexión y Acción, "Paying the price for flexibility: workers' experiences in the electronic industry in Mexico" (2015), p. 36.

[17] See www.inegi.org.mx/saladeprensa/aproposito/2016/agricola2016_0.pdf.

[18] See www.cndh.org.mx/Migrantes.

cent) do not attend school.[18] In 2014 an amendment to article 123 of the Constitution raised the minimum age for admission to employment from 14 to 15 years, and in 2015, Mexico ratified the ILO Minimum Age Convention, 1973 (No. 138). A 2015 reform of the Federal Labour Law raised the minimum age for work considered unhealthy and dangerous to 18 years.

73. The National Development Plan 2013-2018 includes the policy objective of eradicating child labour. An interministerial commission for the prevention and eradication of child labour and the protection of young workers was established in 2013 and includes representatives of experts from international organizations and the business sector, workers and civil society organizations. Its purpose is to coordinate the agencies of the federal public administration in the design, implementation and evaluation of policies, programmes and actions to eradicate the worst forms of child labour by 2016 and to effect a 60 per cent reduction in child labour by 2018. As one of the measures taken, in 2015, a dedicated e-mail address was created to receive complaints from the public about cases of child labour. A protocol for the inspection of working places to eradicate child labour has also been developed by the Ministry of Labour and Social Welfare in collaboration with ILO.[20]

74. The Working Group also learned about the certification scheme entitled "Distinctivo Mexico sin trabajo infantil", started in 2014 with the aim of disseminating good practices and recognizing workplaces and institutions that have implemented labour practices that contribute to the prevention and eradication of child labour.

75. Another scheme was initiated in 2010, entitled "Distinctivo empresa agricola libre de trabajo infantil", to recognize workplaces in the agricultural sector with policies to prevent child labour. In 2016, the certification had been granted to 324 workplaces in 21 states.

76. The Working Group welcomes these significant initiatives for the prevention and eradication of child labour and encourages the Government of Mexico to continue to adopt measures to avoid the worst forms of child labour and to involve independent evaluators and civil society representatives in the process of certifying good business practices in this area.

C. Persons with disabilities

77. Another challenge in Mexico is to include persons with disabilities in the labour market. According to the Ministry of Labour and Social Welfare, some 7.2 million people (6 per cent of the total population) have some form of disability.[21] According to national statistics, the participation rate of persons with disabilities in economic activities is 39.1 per cent, which is 25.6 per cent below that of persons without a disability. The Working Group notes the existence of a national programme for work for and employment of persons with disabilities for the period 2014-2018, a national council for the development and inclusion of persons with disabilities, a general law for the inclusion of persons with disabilities (2011), a national programme for the development and inclusion of persons with disabilities, and provisions in the Federal Labour Law requiring workplaces with more than 50 employees to provide for adequate installations to be accessible for persons with disabilities (art. 132) and fiscal stimulus for workplaces that hire persons with disabilities.

D. Gender-based discrimination

78. Gender-based discrimination in employment is a serious concern. According to ILO, the labour force participation of women (42.2 per cent) is the lowest not only among

[18] See data from the National Institute for Statistics and Geography, available from www.inegi.org.mx/saladeprensa/aproposito/2016/infantil2016_0.pdf.

[20] Available from www.gob.mx/cms/uploads/attachment/file/25144/Protocolo_de_Inspeccion_en_Materia_de_Trabajo_Infantil_STPS.pdf.

[21] See www.inegi.org.mx/saladeprensa/aproposito/2015/discapacidad0.pdf.

Organization for Economic Cooperation and Development (OECD) countries, but also in the whole of Latin America. The employment rate for women is 44.6 per cent, 33.5 percentage points less than men, and the wage gap between men and women amounts to 18.3 per cent.[22] Discrimination faced by women is also reflected in a low number of women in decision-making positions both in the public and private sectors. Less than 5 per cent of companies registered on the Mexican stock exchange have female chief executive officers.

79. Between 2011 and 2016, the National Council for the Prevention of Discrimination received 1,726 complaints filed by women, among which 73 per cent relate to acts of labour discrimination or discrimination in the workplace. According to national statistics, 26.3 per cent of women report having faced discrimination in the workplace, and 14.9 per cent report discrimination related to pregnancy, such as having been requested to provide employers with pregnancy tests.[23] This is despite the fact that such discrimination and harassment is clearly prohibited and sanctioned in law.

80. The Federal Labour Law prohibits, and imposes penalties on employers for, discrimination in the workplace based on ethnic origin or nationality, gender, age, disability, social status, health condition, religion, migration status, opinions, sexual orientation, civil status or any other ground that offends against human dignity (art. 3). For example, if an employer does not respect the prohibition of discriminatory practices, the Labour Law provides for a penalty equivalent to between 250 and 5,000 times the minimum wage (art. 994, sect. VI).

81. The Working Group noted with interest the norm on labour equality and non-discrimination of 2015, jointly developed by the Ministry of Labour and Social Welfare, the National Institute for Women and the National Council for the Prevention of Discrimination. The norm is aimed at publicly recognizing workplaces that comply with equality and non-discrimination standards. It provides for a certification of companies that comply with 14 requirements; currently, 14 workplaces, among them private companies and public sector institutions, have been certified, as part of the effort to promote inclusive and non-discriminatory workplaces.[24]

E. Human rights defenders

82. Between 2010 and 2014, a total of 615 cases of human rights abuses against human rights defenders, including 36 murders, have been reported.[25] Several United Nations special rapporteurs have urged Mexico to take urgent action to address this alarming situation.

83. The Working Group heard testimonies from human rights defenders who explained that they faced continued attacks, threats, harassment and aggression because of their work to protect and promote human rights. Environmental human rights defenders and indigenous leaders in particular have been targeted when they have opposed development projects.

84. In a context of widespread cases of intimidation and harassment against community leaders who speak out against specific business operation and projects, the Working Group found the voice of business enterprises conspicuous by its absence. This is particularly worrying given reported cases of such intimidation and acts of violence being carried out by employees of, or those involved in business relationships with, those same companies.

85. Companies should have a strong incentive to clearly and publicly distance themselves from acts of violence and intimidation and to conduct their own human rights due diligence. A failure to respect human rights also carries a high financial cost, when

[22] See www.conapred.org.mx/index.php?contenido=pagina&id=562&id_opcion=703&op=703.
[23] See www.inegi.org.mx/saladeprensa/aproposito/2016/violencia2016_0.pdf.
[24] See www.gob.mx/cms/uploads/attachment/file/128194/Padron_de_CT_certificados_NMX.pdf.
[25] Inter-American Commission on Human Rights, *Situation of Human Rights in Mexico* (2015), available from www.oas.org/en/iachr/reports/pdfs/mexico2016-en.pdf.

projects are delayed due to inadequate human rights due diligence, and a company's reputation is damaged as a result of being associated with human rights abuse.

86. The Working Group recognizes that the Government has taken steps to protect human rights defenders, such as the national mechanism for the protection of human rights defenders, which currently protects 465 human rights defenders and journalists. Senior government officials have made statements to publicly acknowledge the critical role played by human rights defenders and civil society organizations, including journalists. However, too often cases of attacks against human rights defenders remain unpunished without effective investigations and sanctions. State and federal authorities must take a clear stance against such cases of attacks and intimidation.[26]

87. The media in Mexico also play an important role in shining a light on cases of human rights abuse. In this regard, the Working Group saw evidence of censorship and sanctioning of investigative journalists who have exposed conflicts of interest and corruption. The Working Group learned from one of the country's leading journalists how she and members of her team of investigative journalists had faced sanctions (dismissals from their work) and a series of lawsuits as a result of investigations into high-profile cases of corruption and abuse of power.

VIII. Access to remedy

A. State-based judicial mechanisms

88. The courts play a key role in protecting against business-related human rights abuse and violations. In this regard, the Working Group welcomes the efforts of the Supreme Court to provide guidance to lower courts on how to deal with such cases. In particular, the Working Group found very useful the 2014 protocol for action in cases related to development and infrastructure projects. The protocol provides specific guidance for 12 human rights found to be particularly at risk in the context of such projects, including the rights to due process, information, freedom of expression, adequate housing, food, water and sanitation.[27]

89. One of the main mechanisms available to victims to address human rights violations, including in the context of business operations, is the *amparo* procedure, set out in articles 103 and 107 of the Constitution, which can be applied by federal courts, including the Supreme Court. The *amparo* procedure serves as an ultimate resort to ensure the protection of individuals against violations of human rights guaranteed in the national Constitution and in the international human rights treaties to which Mexico is party.

90. One change introduced by the *Amparo* Law of 2013 is that any legal person can be considered a responsible authority when carrying out acts equivalent to those carried out by the State authorities that adversely affect the human rights of a third party. In other words, an *amparo* ruling can in principle be issued against actions or omissions by a business enterprise.

91. The large number of *amparo* orders in cases concerning business-related human rights harm would seem to be an indication that other means of mediation and dispute settlement are failing.

92. The Working Group heard of several cases where *amparo* rulings in favour of aggrieved individuals had not been duly complied with, seemingly without any legal consequences, weakening the effectiveness of the procedure and undermining the rule of law. The Supreme Court has also expressed concern about this state of affairs, noting that

[26] See also recommendations contained in the end of mission statement of the Special Rapporteur on the situation of human rights defenders on his visit to Mexico from 16 to 24 January 2017, available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21111&LangID=E.

[27] Supreme Court, *Protocolo de actuación para quienes imparten justicia en casos relacionados con proyectos de desarrollo e infraestructura* (2014).

about one third of cases heard by the Court relate to the non-implementation of judicial orders by public officials.[28] This is despite a clear sanctioning of such non-implementation under the Constitution (art. 107, sect. XVI), which provides that if, after *amparo* is granted, the responsible official persists in repeating the contested act or attempts to evade the decision of the federal authority, he or she is to be immediately removed from office and taken before the appropriate district judge. The Government informed the Working Group that the situation had been improving and that since 2014 there had been a constant decrease of reported incidents of non-compliance with judicial orders.

93. Another limitation is that the *amparo* procedure is not easily accessible to victims. In this regard, the Working Group noted that in several cases *amparo* rulings that had been able to stop an ongoing human rights violation had been made possible only through the intervention of non-governmental organizations volunteering to assist and provide legal aid to victims.

B. State-based non-judicial grievance mechanisms

Human rights commissions

94. Mexico has a national human rights commission, established in 1990, accredited by the Global Alliance of National Human Rights Institutions as being in A-status compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). Equally, each of the federal states, as well as Mexico City, has its own human rights institution. The commissions play an important role in helping victims of business-related human rights abuse to gain access to remedies. While, currently, these institutions do not have a mandate to deal directly with human rights cases related to acts or omissions of business enterprises, they do so indirectly by addressing acts or omissions of public authorities in such cases. The National Human Rights Commission and the state commissions the Working Group met with in Oaxaca, Jalisco and Sonora have all issued several recommendations related to the conduct of business enterprises.

95. The Working Group was particularly pleased to see that the National Human Rights Commission has taken the Guiding Principles fully on board. The Commission has published a booklet on the Guiding Principles and was actively seeking to raise awareness among businesses about the importance of human rights due diligence. The Commission is ideally placed to conduct such awareness-raising campaigns and to facilitate dialogue between the different parties.

96. The Working Group also welcomed that the Human Rights Commission of the Federal District, through its human rights and business programme, has emphasized the need to include a focus on the role of business in the implementation, monitoring, evaluation and financing of the Sustainable Development Goals and the New Urban Agenda.

Organization for Economic Cooperation and Development National Contact Point

97. The Working Group also met with the OECD National Contact Point, located since 2008 in the Ministry of Economy. Under the OECD Guidelines for Multinational Corporations, Mexico is obliged to establish a functioning national contact point, with adequate human and financial resources, to undertake promotional activities and handle specific cases ("instances") related to the implementation of the Guidelines, including the chapter on human rights aligned with the Guiding Principles. Thus, national contact points are meant to also serve as a grievance mechanism in cases of adverse impacts on human rights caused by multinational enterprises, including by Mexican companies operating abroad. In the case of Mexico, however, the national contact point has, to date, taken up a total of five cases and has focused primarily on awareness-raising efforts through meetings with companies.

[28] Ibid., p. 75.

C. Non-State-based grievance mechanisms

98. The Working Group notes that some of the large enterprises have different forms of company-based grievance mechanisms. However, in its conversations with representatives of business and other stakeholder groups, the Working Group did not hear of any cases where such mechanisms have been instrumental in detecting grievances at an early stage and more effectively preventing human rights impacts. While operational grievance mechanisms should not be a substitute for access to judicial mechanisms, ensuring easy access for workers and affected communities to grievance mechanisms, in line with the criteria set out in guiding principle 31, is a key component of the corporate responsibility to respect human rights.

IX. Strengthening the policy framework

99. The National Human Rights Programme 2014-2018 included, for the first time, a specific reference to the promotion of human rights in policies and activities of business enterprises. In particular, it includes five action points (strategy 4.4): (a) strengthen the mechanisms aimed at ensuring that business enterprises respect human rights; (b) encourage business enterprises to include human rights in their principles, codes and policies; (c) promote a human rights approach/focus in corporate social responsibility; (d) promote legislation to regulate business activities that guarantees human rights; and (e) ensure that business enterprises know their human rights responsibilities.

100. As a main step taken towards the implementation of these objectives, a process was initiated in December 2015 to develop a national action plan on business and human rights. The process is being led by the Ministry of the Interior together with the Ministry of Foreign Affairs and an intersectoral working group involving several ministries and representatives of business, civil society, trade unions and the United Nations system. The Working Group was able to participate in an extraordinary meeting of the national action plan working group and was encouraged by the seriousness of the endeavour and the constructive spirit of the dialogue.

101. The Government has commissioned a group of civil society organizations to prepare the baseline assessment that will inform the national action plan. The Working Group considers this to be a very good practice.

102. The Working Group looks forward to following this promising process, which has potential to instil a culture of dialogue across states, business and civil society. For the national action plan process to succeed, it will be critical to maintain its inclusive, multi-stakeholder nature in the development, implementation and monitoring phases.[29]

X. Conclusions and recommendations

103. **The Working Group observed a high level of distrust among different stakeholders. Inadequate levels of transparency and consultation with affected communities contribute to such distrust, while perceptions of corporate capture are reinforced by cases of harassment and intimidation against those who speak out about human rights abuse related to development projects and business operations.**

104. **Human rights defenders and journalists must be better protected to allow them to carry out their crucial role. In the face of widespread attacks and intimidation against people who speak up for their rights, Government officials at the highest level and chief executive officers of businesses must take a clear stance that intimidation of and attacks on human rights defenders are not acceptable and will not be tolerated.**

[29] See guidance published by the Working Group on national action plans on business and human rights, available from www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

105. **The Working Group also found a lack of practice or tradition for dialogue with communities in the context of large-scale projects and a strong need to design and implement effective mechanisms for consultation and strengthen a culture of social dialogue. Consultations must be undertaken as early as possible in the process of project design, and must leave open the option that some projects may not be viable.**

106. **In spite of the challenges faced, the Working Group is encouraged that there is a commitment on the part of the Government to move the business and human rights agenda forward. It is also encouraged by the fact that, despite high levels of violence and impunity, there is a thriving civil society in Mexico and open public debate, which will make progress possible.**

107. **The Working Group makes the following recommendations to the Government, business enterprises and civil society organizations.**

108. **The Working Group recommends that the Government:**

(a) **Build capacity and raise awareness among civil servants and lawmakers of the Guiding Principles on Business and Human Rights;**

(b) **Ensure prior and informed consultations with communities affected by planned development projects and business operations, initiated as early as possible in the process of determining project designs and assessing impacts, including through instructions to public officials about this requirement;**

(c) **Take additional steps to ensure compliance in practice with international standards on free, prior and informed consent of indigenous peoples;**

(d) **Provide guidance and set clear expectations for all business enterprises, including in the banking sector, about their responsibility to respect human rights throughout their operations, both domestic and international;**

(e) **Use its leverage to influence business practice, ensure that State-owned or controlled business enterprises lead by example, include human rights criteria in its public procurement practices and integrate human rights due diligence into the policies and lending practices of national development banks;**

(f) **Facilitate dialogue and mediation between business enterprises and communities affected by business operations and projects;**

(g) **Develop a national action plan on business and human rights on the basis of multi-stakeholder engagement, including representatives of civil society organizations, national business associations, sectoral trade unions and representatives of indigenous communities;**[30]

(h) **Make social impact assessments that integrate human rights standards (in line with the Guiding Principles) a requirement for major development projects in all sectors, and provide adequate resources to oversee and support such assessments;**

(i) **Strengthen the capacity of the office of the Federal Attorney for Environmental Protection to monitor the compliance of business operations with environmental standards;**

(j) **Strengthen the capacity of the labour inspectors to monitor compliance with labour standards, including working conditions of agricultural day labourers;**

(k) **Incentivize business to improve safeguards in areas such as occupational health and efforts to combat child labour, while ensuring that certification schemes to promote business "self-management" do not become substitutes for effective government oversight;**

(l) **Step up efforts to promote the inclusion of persons with disabilities in the workplace, following up on recommendations made by the Committee on the Rights**

[30] See the Working Group's guidance on national action plans.

of Persons with Disabilities to implement affirmative action measures both in the public and private sectors;[31]

(m) Step up efforts to address gender-based discrimination and sexual harassment in the workplace, including through improved forms of grievance mechanisms;

(n) Address concerns about "protection contracts" to fully protect the right of freedom of association, seeking technical advice and assistance from ILO;

(o) Strengthen the national mechanism for the protection of human rights defenders, including through effective investigations and sanctions to address the conditions that place human rights defenders at risk;

(p) Establish mechanisms to provide legal assistance to victims;

(q) Review obstacles faced by victims in accessing an effective remedy, including as part of the national action plan process, with a view to strengthening judicial and non-judicial grievance mechanisms, in line with recommendations contained in the report of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse;[32]

(r) Ensure that *amparo* orders and other judicial decisions and suspensions are respected and implemented;

(s) Expand the mandates of national and state human rights commissions to enable them to investigate cases of human rights abuse caused by acts or omissions of business enterprises;

(t) Set up administrative grievance mechanisms to allow public authorities to detect grievances at an early stage and more effectively prevent against human rights abuse, following the example of the innovative grievance mechanism operated by the National Council for the Prevention of Discrimination;

(u) Strengthen the OECD National Contact Point, in line with best practices of other such mechanisms in other countries, to enable it to carry out its role to facilitate dispute resolution and handle specific complaints of alleged breaches of the human rights chapter of the OECD Guidelines for Multinational Enterprises, which is consistent with the Guiding Principles, both by multinationals operating in Mexico and by Mexican multinationals operating abroad.

109. **The Working Group recommends that all business enterprises, including private enterprises and State-owned enterprises, implement the Guiding Principles, and specifically:**

(a) Adopt a human rights policy and human rights due diligence procedures to identify actual and potential human rights risks, and to prevent, mitigate and account for how they address adverse human rights impacts;

(b) Increase transparency and openness to listen to critical voices, finding ways to facilitate dialogue and interaction with affected communities;

(c) Establish and run operational grievance mechanisms, alone or in collaboration with others, in line with guiding principle 31, in order to identify and address adverse impacts;

(d) Take a clear stance that intimidation and attacks on human rights defenders and investigative journalists who raise concerns about business operations are not acceptable and will not be tolerated;

[31] CRPD/C/MEX/CO/1.

[32] A/HRC/32/19 and Add.1.

(c) Adopt a comprehensive understanding of human rights due diligence encompassing the responsibility to prevent, mitigate and remedy adverse impacts caused by their activities, including in their supply chains;

(f) Ensure meaningful consultation with potentially affected individuals and communities, ensuring that they have timely and complete information about proposed projects or changes that may affect them, and accept that such consultation processes might result in a change to the project;

(g) Integrate human rights due diligence, in full and explicit alignment with the Guiding Principles, into sustainability reporting requirements of the Mexican stock exchange;

(h) Engage in the development of a national action plan on business and human rights.

110. **The Working Group recommends that civil society organizations:**

(a) Continue to raise awareness about the respective obligations and responsibilities of the Government and of business enterprises under international human rights law;

(b) Continue to champion the rights of affected communities and human rights defenders;

(c) Engage in developing a national action plan on business and human rights through multi-stakeholder dialogue, including the voices of affected communities.

United Nations A/HRC/35/32/Add.3

General Assembly

Distr.: General
7 June 2017

English only

Human Rights Council
Thirty-fifth session
6-23 June 2017
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea: comments by the State

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the comments by the State on the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea: comments by the State*

Comments by the Republic of Korea on the Report of the Working Group on the issues of human rights and transnational corporations and other business enterprises on its visit to the Republic of Korea

1. The Government of the Republic of Korea notes with appreciation the report of the Working Group on the issues of human rights and transnational corporations and other business enterprises (WG) on its visit to the country from 23 May to 1 June 2016.

2. We believe the WG's recommendations stem from its expertise and attentive observation of our domestic policies and practices. We acknowledge the WG's observation on our willingness to study international best practice and improve policies and practices relating to business and human rights. We also find it encouraging that the WG commends the activities by some of our national agencies, local authorities and business enterprises to promote and protect human rights in relation to business conduct.

3. However, there are some paragraphs in the WG's report that we want to make comments on. Our comments include information on specific measures to address human rights abuses in the workplace, as well as those resulted from business activities in the country. Also, there are issues regarding our legislative framework on labour standards and the public procurement system.

4. In order to respect, protect and fulfill human rights and fundamental freedoms in the context of business activities, the Government of the Republic of Korea will continue to promote the implementation of the Guiding Principles on Business and Human Rights (the Guiding Principles) and consult with the WG to this end.

5. Our specific comments on some paragraphs of the report are set out below.

Para. 24

6. Regarding unfair labor practices at Yoosung Enterprise Co., after conducting a special inspection in 2011 and a random inspection in 2013, the Ministry of Employment and Labor (MOEL) sent the case to the prosecutors' office for "partial prosecution". During the 2013 inspection, MOEL also investigated Hyundai Motor Company for its involvement in unfair labor practices. When concerns were raised about abusive labor management by the company after a union member's suicide, MOEL organized a temporary health examination and management committee (Jul. 15, 2016) and ordered Yoosung Enterprise Co. to conduct a temporary health examination (Jul. 29, 2016). For Hyundai Motor Company's alleged involvement in unfair labor practices, the Korean Metal Workers' Union brought the case to the prosecution (Feb. 3, 2016), who is still investigating the case.

Para. 38

7. During the selection process of the winning bidder, the Public Procurement Service (PPS) promotes social responsibility by giving additional points to socially disadvantaged

* Reproduced as received.

enterprises and enterprises that reflect the social and environmental value in the eligibility test for goods, services, and construction works.

- Giving additional points to socially disadvantaged enterprises (women-owned, disabled, small enterprises) and enterprises that reflect the social and environmental value (employment, environmental certification, human rights etc.)
- Multiple Award Schedule (MAS)-contracted goods and services, the 2nd stage competition has evaluation criteria that include selective points for socially disadvantaged enterprises, enterprises with high employment rate of severely disabled, women etc., and social enterprises.
- Construction work projects over USD 30 million, PPS implements a comprehensive evaluation method, which the bidder gets the highest score comprehensively based on bid price, execution capability, and social responsibility[1].

<e.g. Table of Evaluation Criteria for Social Value on Public Goods Procurement>

Category	Eligibility Test (Additional Point)		MAS 2nd Stage Competition (Scales of Point)	
Supporting socially disadvantaged enterprises	Women owned (0.25~1.25 Point)	Period of women owned business	Disabled owned (less than 5 points)	products from severely disabled enterprises
		High employment rate of women		Social enterprises
		High gender equal employment rate firm		Disabled owned firm
	Disabled owned(1~2points)	Disable owned		Standard disabled production
		High employment rate of disables		early stage of start-up firms
	SMEs(Manufacturing)(1~2points)	SME, Micro-enterprise		women owned
Reflection of Social / Environmental value	Creation of employment(1~3points)	Excellent firm on hire new recruits	Excellent on hire employment (less than 5 points)	Excellent on hire new recruits
	Joint supply and demand(0.5~1.5points)	Joint supply and demand with socially disadvantaged firms		
	Green product certification(0.75~1.5points)	Certificate of Green technology		
		Certificate of excellent recycle		
		Certificate of high energy efficiency of devises		
		Environmental		

[1] Indicator of social responsibility includes construction safety, fair subcontracting, participation of local suppliers and prompt payment of wages.

		product declaration		
		1st class of energy consumption		
		Certificate of new renewable energy		
	others(0.2~5points)	Certificated family friendly firms	Others (Less than 5points)	Social enterprises
		Excellent firm on labor-management culture		
		Excellent firm on sub-contracting management		
		Participated firm on Learning and Working System		
		Firm on creation of flexible working hour jobs		
		Participated firm on work and life balance campaign		

PPS established a legal framework that reflects various social and environmental values in public procurement process. (Act 14526, amended on Jan. 2017, enforced in July 2017.)

- Art 14526. 5-2(Promotion on social responsibilities) In order to encourage social responsibilities of enterprises, the Administrator of the Public Procurement Service may reflect the social and environmental value, such as the environment, human rights, labor, employment, free trade, and consumer protection, to the procurement procedures.

Para. 43

8. (Yellow union) In Korea, any employer's attempt to establish a "yellow union" to interfere with autonomous union activities in the workplace is strictly prohibited as an unfair labor practice. More specifically, any employer involved in such a prohibited practice shall be punished with no more than two years in prison or no more than KRW 20 million in fine. Apart from criminal punishment, remedies may be sought through the labor relations commission against unfair labor practices. When the labor relations commission finally decides that a remedy should be made, the employer is required to follow the decision or would face criminal punishment, no more than three years in prison or no more than KRW 30 million in fine.

9. The Korean government's zero tolerance of unfair labor practices has been unwavering. The government has been examining not only reports or accusations of unfair labor practices made by labor but also alleged unfair labor practices to verify whether those allegations are true. This is because the government knows that any unfair labor practice poses a fundamental threat to the order of labor relations. Considering that unions and employers find it difficult to use their real names when reporting grievances, the government has established an "online unfair labor practice reporting center" where they

can report grievances anonymously. For reports, complaints or accusations submitted to the reporting center, the government has been thoroughly investigating them and taking strict action.

10. (**Single bargaining channel system**) The single bargaining channel system in Korea does not violate the right to organize, the right to collective bargaining and the right to collective action. The single bargaining channel system was introduced as part of a tripartite agreement in order to promote unified working conditions in the workplace and, at the same time, address duplicated bargaining, excessive bargaining costs and other side effects of multi-unionism as multiple unions have become allowed to engage in separate bargaining at one enterprise. The single bargaining channel system includes a democratic process of reflecting a large number of union members and a duty of fair representation designed to protect minority union members who lack power to organize bargaining representative unions. This explains why the system was upheld by Constitutional Court as constitutional and has been considered in conformity with international standards by the ILO as the system's way of selecting representative groups within the bargaining unit. The single bargaining channel system comes in various forms in many countries, including the U.S., Canada and the U.K., to realize the principle of one bargaining for one company and establish a bargaining order.

11. (**Lead company's termination of a subcontracting agreement after the establishment of an in-house subcontractor workers' union**) The Korean Supreme Court ruled that the lead company constituted the employer to receive a remedy order for engaging in unfair labor practices against the in-house subcontractor workers' union. Since the ruling, any lead company engaging in unfair labor practices likely to discourage union activities, such as terminating contracts with subcontractors, to control and intervene in subcontractors' unions has faced criminal punishment, and apart from criminal punishment, the three fundamental labor rights of in-house subcontractor workers' unions have been protected through remedy procedures at the labor relations commission.

12. (Compensation for damages against illegal industrial action) Employers are not allowed to cut the wages of their employees simply because of their participation in strikes under the Korean law. Thus, the argument about "deducting wages from workers who went on strike to pay for lost profits incurred by industrial action" is not true. Furthermore, Article 3 of the Trade Union and Labor Relations Adjustment Act provides, "When an employer has suffered damages due to collective bargaining or industrial action under this Act, he shall not claim damages against a trade union or workers". This means no civil liability shall be imposed on unions engaging in lawful industrial action. However, it would be a problem when a union engages in unlawful industrial action by occupying production facilities, relying on an act of violence or vandalism, etc. Giving immunity to such illegal industrial action would run counter to the idea of justice and go against the Constitution of the Republic of Korea. Anyone, including unions, should naturally take responsibility after engaging in action which fails to meet the legal order of the country. For the liability to compensate for damages, it is not something that can automatically be imposed on the workers just because the employer argues it should be; it is the court, a third party, which decides whether the workers are liable or not. It is unreasonable to say that the court's recognition of the liability of a union engaging in unlawful industrial action is no different from a denial of the key element of the right to strike.

Para 54

13. The Korean NCP is established directly under the Ministry of Trade, Industry and Energy (MOTIE), and carries out the core tasks set out in the OECD Guidelines for Multinational Enterprises ('the Guidelines'), including providing 'good offices' to stakeholders and adopting final statement. The Korean Commercial Arbitration Board

provides an auxiliary support by promoting the Guidelines and informing stakeholders of relevant procedures.

14. To reflect various opinions of multi-stakeholders, the Korean NCP has reorganized its committee to include the Ministry of Environment (ME) and the Ministry of Employment and Labour (MOEL) as stated in the report. Furthermore, in February 2017 we appointed additional experts in the field of labour relations and arbitration in an effort to better accommodate the views of multi-stakeholders.

15. With regard to the proposal for engaging in a peer review, the Korean NCP had already expressed its willingness to participate in October 2016, and officially notified the OECD Secretariat in March 2017.

Para.55

16. In accordance with the Act on the Promotion of Workers' Participation and Cooperation, the government runs a grievance-handling system where any business or place of business with 30 employees or more is required to designate no more than three grievance-handling members to deal with employees' grievances. The grievance-handling system is designed to address all kinds of complaints and difficulties employees suffer, so that they can focus on their work with passion and creativity. Any employee may report his/her grievance to grievance-handling members verbally or in writing; when a grievance is reported, the grievance-handling members are required to deal with the case without delay and then notify the employee of the action taken and its results within 10 days. The government has continued to provide various support and guidance on the grievance-handling system to ensure that it is more widely used.

United Nations A/HRC/35/33

General Assembly

Distr.: General
25 April 2017

Original: English

Human Rights Council
Thirty-fifth session
6-23 June 2017
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights: Study of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Note by the Secretariat

The present report is submitted pursuant to Human Rights Council resolution 32/10.

GE.17-06619(E)
1706619

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I. Introduction

1. In its resolution 32/10, the Human Rights Council recognized the importance of dialogue and cooperation among all stakeholders to ensure the effective implementation of the Guiding Principles on Business and Human Rights, in particular with respect to improving corporate accountability and access to remedy for victims of business-related human rights abuses. Against that backdrop, the Council requested the Working Group to present a study on best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights.

2. Owing to the reference to law enforcement, in the present study the Working Group focuses on cooperation with respect to the investigation and prosecution of criminal and administrative law offences. Since certain jurisdictions do not recognize the application of this body of law to business entities, the report includes studies of cases involving economic actors more generally, which include individual business people. However, given the seriousness of certain cross-border harms, States are encouraged where appropriate to investigate and prosecute companies as such, in addition to natural persons. Sometimes it is not possible to identify key individuals responsible for a crime while it is possible to identify the company. Moreover, even if certain individuals are punished, the company could continue its unlawful conduct; thus, the prosecution of companies may create a needed deterrent beyond that which exists by prosecuting individual actors.

3. Principle 2 of the Guiding Principles encourages States to set out the expectation that all business enterprises domiciled in their jurisdiction respect human rights throughout their operations, and recognize that one way of achieving this is through criminal regimes that allow for prosecutions, no matter where the offence occurs, so long as there is a recognized jurisdictional basis.[1] Furthermore, Principle 26 calls upon States to protect against business-related human rights abuse by taking appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing such harm. For cross-border cases[2] of human rights abuse, in which multiple States are involved in some way, cooperation between these States' law enforcement is key to ensuring any "effective" redress.

4. However, to date, there has been little progress in cross-border cooperation that has led to successful law enforcement action in cases focused on business-related human rights abuses. Much of the existing research has focused on the challenges and obstacles to successful prosecution.[3] Indeed, civil society organizations have tried without success to bring claims to national prosecuting authorities. There remains a lack of political will by States to address business-related human right abuses through the lens of criminal law.

5. In the present report, the Working Group examines how States have cooperated successfully in areas related to criminal law and human rights. It also provides a road map of the key tools that could be used in instances where States are presented with cases relating to cross-border human rights abuse linked to business activity. After a discussion on cross-border cooperation practices that work across many types of offences, there is a focus on how States have worked together effectively to deal with international crimes more broadly. While the examples are few, existing models in this context could be deployed more proactively when economic actors are involved in international crimes and

[1] See A/HRC/17/31, annex.

[2] A cross-border case is one where "the relevant facts have taken place in, the relevant actors are located in or the evidence needed to prove a case is located in more than one State". See A/HRC/32/19/Add.1, box 3.

[3] See, for example, Commerce, Crime and Human Rights Project, "The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases" (2016), available from www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf. See also Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (London, 2014).

could also be used when businesses are implicated in general cross-border human rights abuses.

6. Many more cases of successful cooperation to investigate and prosecute economic actors exist in other areas closely linked to human rights. Thus, the report contains an examination of law enforcement practices in the context of other cross-border crimes, such as trafficking in persons, environmental crimes, transnational bribery and corruption, to highlight what types of tools could be used in business and human rights cases. Those cases demonstrate that when States have the political will to act against cross-border harms, they can work together effectively.

7. In the report, the Working Group shows that States already largely possess the tools needed to cooperate effectively with respect to cross-border harms relating to business and human rights. What is needed is a willingness by law enforcement to explore all potential legal avenues for investigating and prosecuting misconduct by economic actors, be it through the lens of international crimes, domestic criminal or administrative offences, or the other types of crimes discussed in the report, where human rights harms occur alongside additional offences. Once the appropriate avenue is decided, the tools discussed can be used, directly or by analogy, to ensure effective cross-border cooperation and, ultimately, greater access to remedy.

II. General practices in cross-border cooperation between law enforcement

8. There are examples of generally applicable best practices involving cross-border cooperation between law enforcement agencies. Those practices are useful techniques that may be deployed regardless of the type of offence being pursued or the type of actor being investigated or prosecuted. The outcome documents of the Accountability and Remedy Project, conducted by the Office of the High Commissioner for Human Rights, laid the groundwork for what should be done to ensure accountability and access to remedy in this regard.[4] To the extent possible, States should implement and adapt those practices in all cases where economic actors are implicated in criminal or administrative offences linked to human rights abuse. In the Working Group's calls for input for the current study,[5] States, national human rights institutions, experts, practitioners, civil society organizations and multilateral institutions provided further information about general practices that should be adopted to ensure effective cooperation in criminal and administrative cases involving business and human rights.

9. States should adopt an appropriate and enabling legal framework that not only prohibits misconduct by economic actors that infringe on human rights but also provides a basis for cooperation between States' law enforcement agencies when violations occur in cross-border cases. Numerous international[6] and regional[7] instruments, as well as bilateral agreements, have detailed provisions on mutual legal assistance and other forms of

[4] See A/HRC/32/19, paras. 24-28 and annex, and paras. 9.1-10.1 and 17.1-18.2; and A/HRC/32/19/Add.1, paras. 32-38 and 62-68. See also www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx for a link to illustrative examples and guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse, specifically for objectives 9.1-10.1 and 17.1-18.2.

[5] For the present study, the Working Group conducted interviews, held and participated in expert consultations and sent out surveys to numerous stakeholders.

[6] For example, the United Nations Convention against Transnational Organized Crime.

[7] For example, the Treaty on Mutual Legal Assistance in Criminal Matters of the Association of Southeast Asian Nations (2004); the Inter-American Convention on Mutual Assistance in Criminal Matters (1992); and the Convention on Mutual Assistance in Criminal Matters between the member States of the European Union (2000).

international cooperation. Regardless of whether a State is party to those treaties, domestic law should have flexible rules to allow for cooperation in a range of circumstances.[8]

10. In order to send and receive requests for assistance efficiently, a central authority should be established to coordinate the process. That authority should provide easy access to up-to-date contact information for all relevant law enforcement authorities within the State and elsewhere.[9] It should also be adequately funded and staffed with mutual legal assistance specialists who can advise those seeking assistance about core procedural requirements. Ideally, staff would be available to handle requests at all times, have the ability to translate different languages and have the capacity to deal with requests made under different treaties. In addition, central authorities should have a system in place to track the status of requests, prioritize urgent appeals and ensure that deadlines are met.

11. States should encourage law enforcement to cooperate in cross-border cases and adequately train authorities on how best to do so. The United Nations Office on Drugs and Crime (UNODC) has developed many tools to help authorities send and respond to requests for mutual legal assistance.[10]

12. Many practitioners identified joint investigation teams as an effective tool to be used in cross-border cases.[11] The European Union has notably supported such teams through legislative efforts[12] and its institutions such as Eurojust. In the absence of such teams, parallel investigations should be explored in which States coordinate their actions so as to increase each investigation's effectiveness and range of targets. Another useful model concerns the establishment of joint centres of investigation. Under that model, investigators from different States work together at a facility in a single State on the same issue. Such a centre has recently been opened in Austria to combat cross-border trafficking in persons.[13]

13. Although such formal means of cooperating are essential for any cross-border case, it was emphasized repeatedly during the Working Group's consultations that informal cooperation was used much more frequently and often yielded better results. Informal cooperation was faster, less expensive and more flexible than requests for mutual legal assistance or letters rogatory for exchange of information. In addition, informal communication could help build a stronger basis and target a request for formal assistance. While a formal letter to counterparts should be sent, experts stressed that, in practice, a personal meeting or telephone conversation was needed to establish some level of trust as a precursor to a working relationship.

14. Joining networks is also a useful way of building trust with foreign counterparts. International[14] and regional[15] associations of investigators and prosecutors often organize conferences to share best practices and promote cross-border relationships. Those associations also have other resources, such as training documents and online communication tools, to foster cooperation. States are highly encouraged to support and utilize organizations that help with operational matters, such as the International Criminal Police Organization (INTERPOL), the European Police Office (Europol) and the Chiefs of Police of the Association of Southeast Asian Nations (ASEAN).

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[8] For example, the Swiss Mutual Assistance Act of 20 March 1981, governing mutual legal assistance procedures both when an applicable treaty exists and in the absence of one.

[9] The United Nations Office on Drugs and Crime (UNODC) provides an Online Directory of Competent National Authorities, available from www.unodc.org/cld/en/v3/sherloc/cnadir.html.

[10] For example, the UNODC mutual legal assistance request writer tool, available from www.unodc.org/mla/en/index.html. See also UNODC, *Manual on Mutual Legal Assistance and Extradition* (Vienna, 2012), available from www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf.

[11] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx for a link to illustrative examples of considerations when developing a joint investigation team agreement.

[12] See, for example, Council Framework Decision 2002/465/JHA, available from http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002F0465.

[13] See www.europol.europa.eu/partners-agreements/member-states/austria.

[14] For example, the International Association of Prosecutors.

[15] For example, the South Eastern European Prosecutors Advisory Group, Ibero-American Association of Public Prosecutors and Southern African Regional Police Chiefs Cooperation Organization.

15. Such organizations administer a range of online tools that have proved indispensable for successful cross-border cooperation. For instance, the INTERPOL I-24/7 Network connects law enforcement through a global, secure communication system and allows them to share sensitive and urgent information 24 hours a day, every day. The Network is connected to numerous INTERPOL databases containing millions of records on identifying characteristics of suspects, stolen travel documents and vehicles, and more. In addition, the World Customs Organization provides an online communication system, supporting multiple languages, that allows secure messages to be sent in real time through its Customs Enforcement Network Communication Platform.

16. Regional tools also exist to facilitate information exchange. For instance, the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition provides the Organization of American States with a secure electronic communication system.

17. Civil society organizations have become increasingly instrumental in investigating cross-border crimes. In addition to utilizing innovative methods of collecting public information, they have investigated cases on the ground in different jurisdictions and have been involved with initiatives aimed at building capacities for greater cooperation.[16] Recognizing the critical role of such organizations in evidence collection, the Office of the Prosecutor of the International Criminal Court has decided to engage with first responders, such as civil society organizations, journalists and health professionals, in order to enhance their ability to collect admissible evidence.[17] During consultations, the Working Group heard from many such organizations that had given law enforcement evidence of criminal cases linked to business and human rights abuses.

18. In all cases of cooperation, States must ensure that the rights of every person, both natural and legal, are respected and protected. Suspects should never be deprived of essential rights, such as the right against self-incrimination or the right not to be subject to torture or cruel, inhuman or degrading treatment.[18] All fair trial rights should be respected, notably the prohibition of double jeopardy. States should share exculpatory evidence with the accused in other jurisdictions even when not legally obliged to do so. Furthermore, various protections and care should be extended to victims, witnesses and whistle-blowers to ensure no intimidation or retaliation occurs.

19. These basic cross-border policies and practices are effectively used to cooperate for a range of offences. The present report proceeds by highlighting how they have been used to address international crimes and other offences with a nexus to business and human rights.

III. International crimes

20. Law enforcement agencies will often cooperate to address cross-border human rights abuses through the lens of international criminal law. International crimes, such as war crimes, crimes against humanity, genocide, torture, slavery and forced labour, are universally condemned. States have developed strong mechanisms for pursuing individuals implicated in international crimes across borders, including by establishing war crimes units.[19] In addition, the Office of the Prosecutor of the International Criminal Court can help national authorities, upon request, as its official policy is to provide assistance to States that are investigating and prosecuting crimes within the jurisdiction of the Court, and

[16] See, for example, www.ictj.org/news/great-lakes-conference-marks-significant-step-regional-cooperation-fight-against-impunity-5.

[17] See International Criminal Court, Office of the Prosecutor, "Strategic plan: 2016-2018" (2015), paras. 25, 55 and 96.

[18] See, for example, International Covenant on Civil and Political Rights, arts. 7, 9-10 and 14-15. Available from www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

[19] See Human Rights Watch, "The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany and the Netherlands" (2014). Available from www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and.

with other serious crimes under national law.[20] This could involve referring evidence derived from field investigations of the Court relating to economic actors involved in international crimes.

21. However, there have been few active investigations and prosecutions of businesses or individual economic actors, despite numerous allegations implicating both in international crimes. To be sure, mounting a successful case for such crimes is a monumental task, particularly owing to the difficulty in obtaining evidence across borders that meets some jurisdictions' stringent admissibility standards. But no reasonable justification exists for neglecting to address allegations of international crimes committed by economic actors. As was emphasized in the Working Group's consultations, such investigations typically are no more expensive or complicated than cases involving terrorism or organized crime.

22. It was established as far back as the trials held under Control Council Law No. 10 following World War II that companies were capable of committing international crimes. In the case of *United States v. Krupp*, it was shown conclusively that throughout the firm of Krupp and its subsidiaries, prisoners of war had been employed in armament production, in violation of the laws and customs of war. Similarly, in the *Farben* case (*United States v. Krauch*), the tribunal noted that where private individuals, including legal persons, exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action is in violation of international law.[21] While the companies as such were not prosecuted in the trials, the industrialists in charge of the companies were found guilty of committing the war crimes of plunder and the use of slave labour.

23. In the 70 years since those cases, the Working Group is unaware of a single successful prosecution of a company for committing or aiding and abetting an international crime. Numerous attempts have been made at initiating investigations, usually owing to pressure from civil society organizations, yet those investigations languished, often without official explanations for a decision not to prosecute.[22]

24. There have been a few prosecutions of individual businesspeople for cross-border international crimes. One notable case concerns Frans van Anraat, a Netherlands businessman who had supplied chemicals to the regime in Iraq under Saddam Hussein through a web of companies around the world.[23] Those chemicals were subsequently used in attacks against Kurds, killing tens of thousands of people. Originally arrested in Italy in 1989 at the request of the United States of America, van Anraat fled the country after posting bail. In 2004, he was arrested in the Netherlands. The specialized Netherlands International Crimes Unit conducted the case and successfully admitted evidence derived from multiple jurisdictions, including Belgium and the United States. Van Anraat was subsequently found guilty by a Netherlands court for being complicit in war crimes and was ultimately sentenced to 17 years in prison.

25. In addition, a specialized unit in the Norway National Criminal Investigation Service focusing on international crimes successfully prosecuted a businessman for complicity in genocide in Rwanda.[24] Sadi Bugingo was a businessman in Kibungo and had used his wealth and status to support the Interahamwe militia, including by handing out supplies to fighters at his store in the city centre.[25] In investigating the case, Norwegian officials

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[20] See Office of the Prosecutor of the International Criminal Court, "Policy Paper on Case Selection and Prioritisation" (2016). Available from www.icc-cpi.int/iccdocs/otp/20160915_OTP-Policy_Case-Selection_eng.pdf.

[21] See *United States v. Krupp* and *United States v. Krauch* (1948). Available from www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-IX-X.pdf.

[22] See "Corporate Crimes Principles" (footnote 2 above).

[23] See www.haguejusticeportal.net/index.php?id=6332.

[24] See https://trialinternational.org/latest-post/sadi-bugingo/ and www.internationalcrimesdatabase.org/Case/919/Bugingo/.

[25] See 2013 Oslo District Court Judgment, pp. 16-17. Available in Norwegian only from www.asser.nl/upload/documents/20130226T095633-Oslo%20District%20Court%20Judgment%2014-02-2013%20Norwegian.pdf.

requested meetings with authorities in Rwanda. After sending a high-level delegation to Rwanda to discuss the case in person, the police were granted full access to conduct their own investigation in the country and were able to secure around 100 witness testimonies about the case. These proved indispensable at trial, as other forms of evidence were hard to gather decades after the events. In 2013, a district court in Oslo convicted Bugingo and sentenced him to 21 years in prison.

26. The Norwegian authorities successfully prosecuted a cross-border international crimes involving network, crime, and witness-tracking complex and involve events occurring many years earlier. Specialized units devoted to international crimes help in that regard, and networks such as the Genocide Network of the European Union can facilitate cross-border cooperation.[24] What is required is a recognition of the role that companies and other economic actors play in these crimes and a corresponding willingness to pursue these actors through the criminal justice mechanisms.

IV. Cases involving transnational harm and economic actors

27. While there have been few cases in which economic actors have been charged for violating core international crimes, successful investigations and prosecutions are more prevalent for other cross-border harms closely linked to human rights. By detailing the practices that law enforcement agencies use to cooperate in cases of trafficking in persons, environmental crimes, transnational bribery and corruption, the Working Group hopes that States will realize that they already possess a toolkit that can be transposed to the business and human rights context. Thus, in the following sections, the Working Group discusses the legal frameworks, tools and networks that facilitate cooperation between States with respect to each crime and provide cases to illustrate how these work in practice. The cases demonstrate that, when States decide to act, they are able to effectively work together.

A. Trafficking in persons

28. Trafficking in persons is a ubiquitous phenomenon that has rightly been the focus of many Governments and law enforcement agencies around the world. The International Labour Organization (ILO) has estimated that millions of persons are trafficked at any given point in time and that annual profits from trafficking range in the tens of billions of dollars.[25]

29. Trafficking in persons is a serious crime that has been recognized as a serious human rights issue. Numerous international and regional human rights instruments prohibit trafficking, and the General Assembly and Human Rights Council have repeatedly affirmed that trafficking violates and impairs fundamental human rights. Moreover, practices associated with trafficking, such as debt bondage and forced labour, constitute discrete human rights violations.

30. Although trafficking in persons can occur within a single jurisdiction, it often has cross-border elements. Victims are routinely trafficked across borders to be exploited in different States. Likewise, traffickers move between States to evade detection and punishment. Since victims, witnesses, defendants, and actions can all be in different States, there is a growing consensus that the problem cannot be countered by any one country in isolation.

[24] The European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, otherwise known as the Genocide Network, was established through Council of the European Union Decision 2002/494/JHA "to ensure a close cooperation between national authorities in investigating and prosecuting [international crimes]". See www.eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx.

[25] See ILO, *ILO Action Against Trafficking in Human Beings* (Geneva, 2008), p. 1. Available from www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090356.pdf.

31. Until the adoption in 2000 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Trafficking Protocol), the international legal framework covering trafficking in persons had been a patchwork of treaties addressing slavery,[28] prostitution,[29] labour regulation[30] and human rights.[31] The Trafficking Protocol provided the first comprehensive and internationally agreed-upon conception of trafficking in persons, defining it as "the recruitment, transportation, transfer, harbouring or receipt of persons, by [certain improper] means ... for the purpose of exploitation". States are required to criminalize this conduct and, by virtue of the United Nations Convention against Transnational Organized Crime, liability must also be established for legal persons.[32] Furthermore, both the Convention and its Trafficking Protocol have detailed provisions on many different forms of cross-border cooperation.[33]

32. At the regional level, the Council of Europe Convention on Action against Trafficking in Human Beings is a good example of a legally binding instrument covering trafficking. As with the Trafficking Protocol, it obliges States to criminalize trafficking in persons, ensure that legal persons be held liable for offences and cooperate with each other to investigate and prosecute cross-border cases.

33. Many different multilateral organizations have dedicated teams on trafficking in persons and have created useful resources to facilitate cross-border cooperation. For instance, UNODC has created multiple guides on trafficking in persons and cooperation,[34] maintains an online directory of authorities designated under the Trafficking Protocol,[35] has developed a human trafficking knowledge portal to share legislation and jurisprudence regarding trafficking in persons[36] and implements capacity-building projects with States.[37] INTERPOL provides operational support and has specific tools on trafficking in persons in its I-24/7 network, such as the Human Smuggling and Trafficking message and MINDFIND, to share information regarding trafficking and to run instantaneous checks against INTERPOL databases.[38]

34. Several European tools provide examples of regional initiatives that help cross-border cooperation in cases of trafficking in persons. Under the Schengen system, the Visa Information System and Second Generation Schengen Information System allow participating States to exchange information regarding the movement of people, including by issuing and consulting alerts in real time on missing persons and suspected criminals.

35. Europol administers multiple information exchange systems and an operational project — FP Phoenix — to provide a range of specialist services related to cases of trafficking in persons. Similarly, Eurojust has a project dedicated to trafficking in persons and a case management system that helps coordinate operational activities. The

[28] For example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

[29] For example, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1956).

[30] For example, the ILO Forced Labour Convention (1930) (No. 29) and Abolition of Forced Labour Convention (1957) (No. 105).

[31] For example, the Convention on the Elimination of All Forms of Discrimination against Women, art. 6 (1979); Convention on the Rights of the Child, art. 35 (1989); and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, arts. 1-3 (2000).

[32] See Trafficking Protocol, arts. 1 and 5, and United Nations Convention against Transnational Organized Crime, art. 10.

[33] See Trafficking Protocol, arts. 9-13 and 15, and United Nations Convention against Transnational Organized Crime, arts. 7, 15-21 and 26-30.

[34] For example, the Toolkit to Combat Trafficking in Persons (2008), and Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (2004).

[35] Available from www.unodc.org/cld/en/v3/sherloc/ctoadv.html.

[36] Available from www.unodc.org/cld/en/v3/htms/index.html.

[37] See www.unodc.org/southeastasiaandpacific/en/Projects/2009_04/Transnational_Crime.html.

[38] See www.interpol.int/Crime-areas/Trafficking-in-human-beings/INTERPOL-tools.

Organization for Security and Cooperation in Europe also helps ensure efficient cross-border cooperation to deal with trafficking in persons through its Special Representative and Coordinator for Combating Trafficking in Human Beings, who assists with capacity-building and policy guidance.

36. In addition, labour inspectors play a key role in uncovering situations of workplace exploitation. Networks such as the International Association of Labour Inspection and organizations such as the ILO, which has a labour administration and inspection programme, help facilitate cooperation among inspectors, exposing cross-border cases of trafficking in persons.[34]

37. Several cross-border operations have successfully disrupted trafficking in persons. For example, an INTERPOL-led operation in South and Central America with support from 25 countries led to the arrest of over 130 people, the dismantling of several organized criminal networks and the rescue of over 2,500 victims.[35] The operation utilized preparatory training workshops, INTERPOL databases and coordinated checks at several South American airports. It led to both the closure of an adoption agency implicated in the trafficking in children and the arrest of company owners who had instituted slave-like practices in the Plurinational State of Bolivia.

38. In another operation, conducted in Côte d'Ivoire and Ghana and supported by INTERPOL and the International Organization for Migration (IOM), 48 children were rescued and 25 people arrested for exploiting the children in the cocoa and mining sectors.[36] Prior to the rescue, IOM and INTERPOL had developed operational plans and conducted training on how to provide proper assistance to the victims. Specialist officers from the INTERPOL Human Trafficking and Child Exploitation unit, hundreds of law enforcement officers and civil society organizations were involved in the operation.

39. The investigation and prosecution of Kramer Sanitärservice GMBH and N.V. Carantel Motorway Services (now Auto-Grill) in Belgium is a useful example of a cross-border trafficking investigation that clearly implicated business entities.[37] Kramer, a German company, had recruited workers in different countries to provide cleaning services for Carantel in Belgium. Labour inspectors discovered that the workers had been subject to extremely harsh work conditions, sparking an investigation. After noticing irregularities in the workers' German employment forms, the Belgian investigative judge sent a rogatory commission, made up of Belgian police and a labour inspector, to Germany, where there was an ongoing investigation into the same issues. Constructive cooperation between the Belgian and German investigators led to the successful prosecution of both companies and several individuals for human trafficking.

40. The importance of civil society and the media can be seen in cases involving trafficking in persons in South-East Asia. Following investigative reports by several organizations uncovering the use of trafficked workers in the fishing industry, Indonesia initiated prosecutions against Thai employees of an Indonesian company.[38] The Government of Thailand cooperated by sending a multidisciplinary delegation to Indonesia

[34] See ILO, "Labour Inspection and Undeclared Work in the EU" (2013). Available from www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_220021.pdf.

[35] See www.interpol.int/News-and-media/News/2016/N2016-098.

[36] See www.interpol.int/News-and-media/News/2015/N2015-085.

[37] Decision available in French from www.unodc.org/res/cld/case-law-doc/traffickingpersonscasetypes/bel/2012/cour_du_travail_2012/2925_html/BELG030-Case_No_2012-3025.pdf. See also "Corporate Crimes Principles" (footnote 3 above), pp. 5-7.

[38] See "Corporate Crimes Principles" (footnote 3 above), pp. 37-38. See also Environmental Justice Foundation, *Sold to the Sea: Human Trafficking in Thailand's Fishing Industry* (London, 2013); and Kate Hodal et al., "Revealed: Asian slave labour producing prawns for supermarkets in US, UK", *Guardian*, 10 June 2014. Available from www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour.

to assist in the investigation, which included a civil society organization to provide support for the victims.[44]

41. States have effectively investigated cases of trafficking in persons and prosecuted perpetrators by adopting a strong legal framework for the prohibition of trafficking in persons and cross-border cooperation, creating and working with specialized networks to coordinate activities, by collaborating with civil society organizations and by utilizing traditional cross-border cooperation mechanisms. As trafficking in persons is a crime involving transnational human rights abuse and economic actors, the tools used to combat it should be transferable to the business and human rights framework.

E. Environmental crimes

42. The investigation and prosecution of cross-border environmental crimes is another area where States have established well-defined mechanisms for cooperation that may be instructive in the area of business and human rights. Cooperation in cases involving the unlawful movement and disposal of hazardous waste and wildlife and forestry crime shows that when States have the will to prosecute economic actors, they are successful in doing so.

1. Unlawful movement and disposal of hazardous substances and wastes

43. Broadly speaking, the unlawful transport, trade and disposal of hazardous wastes covers the illicit transfer of harmful substances, and the purposeful or accidental dumping of these substances in the environment.

44. The reckless disposal of harmful substances contaminates our air, water and land, putting human health and food security at risk. Improper waste disposal has led to physical injury and death, poisoning and increased rates of cancers, birth defects and neurological disorders. Thus, a range of human rights are implicated when violations take place, most clearly the rights to health and the enjoyment of a safe, clean, healthy and sustainable environment.

45. As with most environmental crimes, the unlawful transfer and disposal of wastes often involves multiple States, typically with waste being sent from more developed countries to less developed countries. Even if waste is disposed of in the State where it was generated, it can still produce negative effects in bordering States if disposed of improperly. Thus, to effectively investigate and prosecute violations, an international response is needed.

46. Several international conventions regulate waste management and call upon States to cooperate with each other to prevent violations. For instance, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal obliges States to prevent and punish the illegal traffic of waste and requires a range of cooperative measures, including the free sharing of information related to the transboundary movement of wastes. The Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade provide additional regulations for the production, use and movement of numerous harmful substances. Furthermore, a range of instruments prohibit pollution of the marine environment and, in some cases, contain provisions on how States should cooperate to enforce that prohibition.[45]

47. Various regional measures add more protections against the unlawful movement and disposal of hazardous wastes. For instance, the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa supplements the Basel Convention and prohibits the import of all hazardous wastes, for any reason, into Africa from non-contracting parties.

[44] See "Thailand's Progress Report on Anti-Human Trafficking Efforts" (2015), p. 6. Available from www.mfa.go.th/main/contents/files/media-center-20150430-161606-980768.pdf.

[45] For example, the United Nations Convention on the Law of the Sea (1982) and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972).

Furthermore, the European Union regulations No. 1013/2006 on shipments of waste and No. 2012/19/EU on waste electrical and electronic equipment ensure further protection against harmful transfers of waste beyond the requirements of the Basel Convention and require member States to impose penalties on businesses that fail to comply.

48. States have a wide range of tools at their disposal to enhance cooperation with each other with respect to investigating and prosecuting waste-based offences. Several initiatives at INTERPOL facilitate closer connections between States and provide support for cross-border operations. For instance, the INTERPOL Pollution Crime Working Group creates a forum for experts and criminal investigators to work together on projects targeting the transboundary movement of hazardous wastes, in particular electronic waste and ship pollution. Project Eden at INTERPOL works with that Working Group and supports States with the exchange of criminal intelligence and regional operations. The World Customs Organization also has a dedicated environmental programme that helps customs agencies around the world tackle the illicit trade in hazardous wastes. Furthermore, the International Network for Environmental Compliance and Enforcement brings together regulators, investigators, prosecutors, judges, civil society organizations and business to implement strategies aimed at improving the enforcement of environmental regulations, including with respect to the management of chemicals and waste.

49. Numerous regional organizations facilitate cooperation between law enforcement agencies in dealing with environmental crime, including the Asian Environmental Compliance and Enforcement Network, Commission on Environmental Cooperation, East African Network for Environmental Compliance and Enforcement, and South American Environmental Compliance and Enforcement Network. The Regional Enforcement Network for Chemicals and Waste connects frontline enforcement officials from 25 countries across North-East, South-East and South Asia to coordinate the control of illegal transboundary waste traffic. In addition, the European Union Network for the Implementation and Enforcement of Environmental Law includes a team on the cross-border shipment of wastes focusing on the implementation of European waste shipment and waste management rules. Beyond capacity-building activities, the Network facilitates joint enforcement projects between States' customs and police authorities.

50. In addition, numerous international and regional information-sharing systems are available to States for investigation of waste-based offences. The INTERPOL Ecomessage system allows law enforcement agencies to securely communicate regarding environmental crime and cross-reference material from other investigations. Similarly, the World Customs Organization has developed ENVIRONET, a communication tool that facilitates information exchange on environmental issues in real time. Regionally, the European Data Interchange for Waste Notification Systems, due to become operational in 2017, will allow authorities in different States to exchange quickly and securely information related to waste shipments within, into and out of the European Union.

51. All of these mechanisms are used by States to cooperate with investigating and prosecuting cases against economic actors, demonstrating that, when States have the political will and work together, they can successfully thwart corporate misconduct.

52. For instance, in 2012, seven European and African countries worked together through the INTERPOL Operation Enigma to target the illegal trade of e-waste.[40] Coordinated checks were done at ports considered to be the source and destination of waste flowing from Europe to Africa, uncovering over 240 tons of illegal e-waste. The operation led to criminal investigations against 40 companies.

53. The World Customs Organization also coordinated operations leading to massive seizures of illegal hazardous waste. In Operation Demeter I, customs agencies from 65 countries worked together to stop the shipment of hazardous wastes from Europe to Asia

[40] See www.interpol.int/News-and-media/News/2013/N20130225.

and Africa.[47] Checks were done at over 300 seaports, with customs administrators notifying each other of suspicious activities through the Organization's secure communication tool. Over 36,000 metric tons of waste were seized during the operation.

54. In 2016, the largest-ever criminal penalty involving deliberate vessel pollution was reached in a plea deal following a case involving cooperation between authorities in the United Kingdom of Great Britain and Northern Ireland and the United States.[48] An engineer for a cruise ship of Princess Cruise Lines Ltd. found the company dumping waste into the ocean and decided to expose the illegality to the British Maritime and Coastguard Agency, which shared the information and other evidence given by the whistle-blower with the United States Coast Guard, which in turn inspected the ship upon arrival in New York. This led to an official investigation by the United States Department of Justice and a $40 million penalty imposed on the company for deliberately polluting the seas and intentionally trying to cover it up.

55. These simple acts of notifying a different jurisdiction of the arrival of a criminal entity and providing evidence given by a whistle-blower led to a massive fine, $1 million of which was shared with the United Kingdom, the notifying State, for projects benefitting the marine environment. Established mechanisms, such as legal instruments providing for cooperation, multilateral networks and online tools to facilitate information exchange dealing with the transfer and disposal of hazardous wastes, have also yielded successful prosecutions of economic actors.

2. Wildlife and forestry crime

56. Wildlife and forestry crime consists of the acquisition, possession or trade of wild fauna and flora contrary to domestic or international law. That includes poaching of endangered animals such as elephants and rhinoceroses for their body parts, and illegal logging.

57. Such activities threaten species and ecosystems, leading to a loss of biodiversity and impacts on the food security and livelihood of communities. Wildlife crime often occurs together with a range of other crimes, including fraud, corruption, money laundering, kidnapping, murder and the trafficking of weapons, drugs and people.[49] Organized criminal groups and non-State armed groups derive significant income from the exploitation and trading of natural resources. Illegal logging itself deprives Governments of billions of dollars of tax revenue and undercuts legitimate, environmentally-responsible forest enterprises. Thus, the total effects of wildlife crime have significant negative impacts for human beings, animals, the environment, business and States themselves.

58. Those impacts are rarely confined to the territory of a single State. Contrary to the trade in hazardous wastes, the illicit trade in wildlife typically flows from less developed countries to more developed countries.[50] Therefore, the transnational nature of wildlife crime calls for a coordinated global response.

59. The most comprehensive international instrument regulating wildlife crime is the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which requires States to set up a system whereby permits are required to import or export listed species. For the most restricted set of animals and plants, trade is prohibited unless scientific and management authorities in both the exporting and importing States authorize

[47] See World Customs Organization, "Operation Demeter: Executive Summary" (Brussels, 2010). Available from www.wcoomd.org/~/media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/environmental-crime/ex_sum_demeter_en.pdf?db=web.

[48] See www.justice.gov/opa/pr/princess-cruise-lines-pay-largest-ever-criminal-penalty-deliberate-vessel-pollution.

[49] See INTERPOL, "Environmental Crime and its Convergence with other Serious Crimes" (Lyon, France, 2015).

[50] See Daan van Uhm, "Illegal Wildlife Trade to the EU and Harms to the World", in *Environmental Crime in Transnational Context: Global Issues in Green Enforcement and Criminology* (2016), pp. 43-49.

the transfer in accordance with the Convention. All States parties must prohibit trade in violation of the Convention and penalize the trade or possession of listed species.

60. The European Union implements the Convention through its wildlife trade regulations and became a party to it in 2015. In addition, it extends even stricter protections with respect to certain forms of wildlife crime. For instance, as part of its Forest Law Enforcement, Governance and Trade Action Plan, the European Union Timber Regulation was adopted, prohibiting illegally harvested timber from entering the European Union market. Companies must exercise due diligence when placing timber or timber products into the market unless the wood has a permit under the Convention or the State of export has licensed it under the above-mentioned Action Plan system. States must adopt effective, proportionate and dissuasive penalties to ensure compliance.

61. The European Union also provides strong protection regarding illegal, unreported and unregulated activity, in areas such as fishing.[51] For such activity, a State will receive a "yellow card" warning if it has a problematic fishing industry. If it does not cooperate in fixing the situation, the State could receive a "red card", banning all fish caught in the State from entering the European Union market. Regulations on illegal, unreported and unregulated activity provide for cooperation mechanisms between the European Union and third countries to help the latter comply with the rules.[52] After receiving a yellow card in 2015, Thailand enacted several measures to reform its fishing industry, including by strengthening its human trafficking laws and improving law enforcement's ability to engage in cross-border cooperation.[53]

62. Domestic laws are also important to ensure robust legal protection against wildlife crime. One notable example is the United States Lacey Act. The Act prohibits the trade and possession of a wide range of plants and animals, including all species protected under the Convention, in violation of United States law, state law and foreign law. Legal entities, alongside natural persons, are subject to the law, and the Act has been the basis for several corporate prosecutions. In Australia, the Illegal Logging Prohibition Act is another example of good legislation addressing wildlife crime. The law makes it a criminal offence for businesses to import any illegally-logged timber and requires businesses to exercise due diligence in this regard.

63. The International Consortium on Combating Wildlife Crime is a collaborative effort of the secretariat of the Convention, INTERPOL, UNODC, the World Bank and the World Customs Organization that supports law enforcement in many ways. Beyond providing tools and guidance documents to teach States how to improve their enforcement efforts, the Consortium can deploy wildlife incident support teams to offer on-the-ground assistance. Together with other organizations, the Consortium helps coordinate multi-State operations to detect and stop cross-border wildlife crime.

64. INTERPOL is another organization that provides operational support and tools to enhance State capacities in this area. Under its Environmental Compliance and Enforcement Committee, INTERPOL has working groups on fisheries crime and wildlife crime, both of which, among other activities, bring together specialists in the area to network and exchange expertise. INTERPOL also has projects dedicated to specific types of wildlife crime and supports States by providing intelligence, analysis, and operational coordination. These include Project LEAF on illegal logging and related crimes, Project Predator on Asian big cats and other wildlife species and Project Scale on transnational fisheries crime.

65. Many regional initiatives exist that focus on cross-border law enforcement cooperation for wildlife and forestry crime. A noteworthy example is the Lusaka Agreement Task Force, an organization open to all African States. The Task Force is a permanent law enforcement institution that facilitates cooperation between States parties

[51] For example, Council Regulation (EC) No. 1005/2008, and Commission Regulation (EC) No. 1010/2009.

[52] See https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/cooperation_note_en.pdf.

[53] See www2.fhaimembers.be/press-release-thailands-progress-in-combating-iuu-fishing/.

with investigating wildlife crime, conducts its own intelligence gathering and undertakes joint investigations and enforcement operations in the territories of States parties. The Task Force helped launch — and is an implementing agency for — the independent Wildlife Enforcement Monitoring System project, which provides a secure, web-based platform for information sharing on unlawful trade and analyses reported data to detect trading routes.

66. Regional wildlife enforcement networks facilitate cooperation through capacity-building, ensuring communication between agencies and synchronizing operations. Examples include the ASEAN network, Central African Forests Commission, Central American network, Horn of Africa network, North America Wildlife Enforcement Group, South American network and South Asian network. States are encouraged to join wildlife enforcement networks in their region or create a regional network if one does not exist.

67. Several of these wildlife enforcement networks, along with the Lusaka Agreement Task Force, World Customs Organization, INTERPOL and other organizations, have worked together on a number of massive joint operations to stop wildlife crime. One of these, named Operation COBRA III, was the biggest ever coordinated international law enforcement operation targeting the illegal trade in endangered species.[54] It involved the cooperation of 62 countries across Africa, America, Asia and Europe. Utilizing the communication system of the World Customs Organization to exchange intelligence, the operation led to hundreds of arrests and the seizure of tens of thousands of illegal wildlife items.

68. INTERPOL Operation Stingray II is another good example of State cooperation. The operation focused primarily on the illicit fishing activity in the Southern Ocean of six vessels that had been believed to be operating in a network to catch high-value fish illegally and ship them to North American and European markets through a complex chain of countries. Forty-nine States, as well as civil society organizations, were involved in the operation, exchanging information to track the ships and coordinating on how to investigate the owners and operators behind them. With the support of an INTERPOL investigative support team, prosecutors in Sao Tome and Principe secured the conviction of three crew members.[55] The operation also led to criminal investigations and prosecutions being brought against companies and individuals in at least seven other countries. In Spain alone, nine companies faced a range of sanctions, including fines totalling more than €17 million.[56]

69. In the area of illegal logging, the INTERPOL-led Operation Amazonas was successful in targeting criminal groups linked to illegal logging in Peru, involving the cooperation of Brazil, China, the Dominican Republic, Mexico and Peru. Coordinated border inspections and intelligence exchange led to the uncovering of violations by individuals and companies and the seizure of over $20 million worth of wood. The success of the operation led to a subsequent investigation (Amazonas II) covering Central and South America, with the cooperation of 12 Latin American countries. That subsequent operation resulted in hundreds of arrests and the seizure of over $45 million worth of timber.[57]

70. The above cases emphasize the importance of utilizing networks to cooperate in cross-border cases. Highly successful operations have been conducted when international and regional organizations coordinate with each other and with domestic authorities and civil society. By using the wide range of tools provided by those networks, including on-the-ground training and information exchange platforms, many economic actors have been caught and prosecuted for engaging in cross-border misconduct.

[54] See Europol, "Europol Supports Largest Ever Coordinated Operation Against Wildlife Crime" (18 June 2015). Available from www.europol.europa.eu/newsroom/news/europol-supports-largest-ever-coordinated-operation-against-wildlife-crime.

[55] See INTERPOL, "INTERPOL-supported illegal fishing investigations lead to prosecution" (13 October 2015). Available from www.interpol.int/News-and-media/News/2015/N2015-160.

[56] See www.fish-i-africa.org/vidal-armadores-banned-fined-and-awaiting-trial/.

[57] See www.interpol.int/Crime-areas/Environmental-crime/Operations.

C. Transnational bribery and corruption

71. Transnational bribery and corruption is another area where cross-border cooperation has been used to successfully investigate and prosecute businesses. States parties to the United Nations Convention against Corruption have universally recognized the harm that transnational bribery causes to the public, and the Office of the United Nations High Commissioner for Human Rights (OHCHR) and Human Rights Council have noted the link between corruption and human rights, as the payment of bribes or embezzlement of public funds are often linked to underlying human rights abuses.[58] The investigation and prosecution of those crimes typically requires the need to detect and track the illegal flows of money across State lines; thus, States need to cooperate to determine where a bribe has been paid and where the illicit proceeds subsequently have moved.

72. The existence of key legal frameworks provides an enabling environment for cross-border cooperation with respect to corruption. In furtherance of treaty commitments, States have created national offences focused on transnational bribery. In addition, relevant treaties oblige States to provide for the criminal or administrative liability of legal persons; hence, there is an explicit recognition that businesses will be the subject of enforcement actions.

73. The United Nations Convention against Corruption, for instance, requires States to establish liability for legal persons and to provide penalties for foreign bribery within their national legislation.[59] The convention also explicitly recognizes the need for mutual legal assistance and cooperation between law enforcement.[60] Article 48 requires States to cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by the Convention, and article 49 obliges States to consider forming joint investigative bodies for cross-border cases.

74. The Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is another instrument that requires States to criminalize the bribing of foreign public officials, establish liability for legal persons and cooperate with one another to enforce its provisions.[61] It was the first anti-corruption treaty to focus on the supply side of bribery in that it requires home States of corporations to hold business entities accountable for bribes paid overseas. It has also been instrumental in making States refine their national laws to ensure companies can be held liable.[62]

75. Both the OECD Convention and United Nations Convention against Corruption contemplate peer learning, as their respective review mechanisms allow States to review each other's implementation of the conventions.[63] OECD has established the Working Group on Bribery, which meets regularly to discuss progress that member States have made with the implementation of its Convention. The Working Group allows States to share experiences and good practices in enforcing foreign bribery laws and provides a robust peer

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[58] See, for example, OHCHR, "The Human Rights Case Against Corruption" (Geneva, 2013), available from www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf; and Human Rights Council resolution 23/9.

[59] See United Nations Convention against Corruption, arts. 16 and 26.

[60] Ibid., arts. 5 (4), 14 (5), 37 (5), 42-51 and 53-62.

[61] See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 1-3 and 9-11. Available from www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

[62] See OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (2016), p. 14. Available from http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf.

[63] See UNODC, "Mechanism for the Review of Implementation of the United Nations Convention against Corruption", available from www.unodc.org/unodc/en/treaties/CAC/IRG.html; and OECD Working Group on Bribery in International Business Transactions, available from www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm.

review process where States evaluate each other's implementation of the Convention on an ongoing basis. Under the OECD process, each State is subject to continuous monitoring, whereas the United Nations Convention against Corruption process provides a staggered review where not every State party is assessed regularly.

76. Several networks exist for practitioners to share useful practices and support each other in operations fighting corruption and recovering assets. For instance, the Camden Assets Recovery Interagency Network, hosted by Europol, brings together law enforcement officers and judicial experts from 54 States and 9 international organizations to share expertise and provide a network whereby members can cooperate to recover assets from unlawful financial transactions including corruption.[64] The effectiveness of the Network model has led to similar networks being established in the Asia Pacific region, Southern Africa and West Africa.[65] The Corruption Hunters Network is another useful group in the fight against corruption, which brings together police and prosecutors from nearly 20 States (and all regions of the world) to exchange experiences regularly and discuss how best to coordinate efforts.[66] The World Bank similarly brings together experts in the field, including non-State actors, every two years as part of its International Corruption Hunters Alliance.

77. A new initiative spearheaded by the United Kingdom, in partnership with Australia, Canada, Germany, New Zealand, Singapore, Switzerland and the United States, will create a permanent centre through which States will be able to cooperate in cases of grand corruption involving international dimensions. The International Anti-Corruption Coordination Centre will be based in London and will establish and implement an operating model based on international cooperation through intelligence collection and analysis, practical actions and case coordination.[67]

78. International financial institutions can play an important role in terms of sharing information with national authorities. For instance, the World Bank Integrity Vice Presidency has helped generate successful domestic prosecutions through its referral system. The Integrity Vice Presidency conducts investigations of World Bank-financed projects to determine if any project-related corruption or fraud has occurred. If, in the course of its investigations, the Bank believes that national laws have been violated, it can provide information to national law enforcement to initiate criminal investigations and prosecutions. The Stolen Asset Recovery Initiative, run jointly with the UNODC, works with States to build capacities and, when requested, assists with specific asset recovery cases.

79. The above-mentioned Initiative has several online tools that can help States recover assets that have been unlawfully transferred overseas. For instance, it compiles asset recovery guides for key jurisdictions around the world.[68] It has also created an in-depth Asset Recovery Handbook that provides guidance on all stages of asset recovery.[69] The OECD Typology on Mutual Legal Assistance in Foreign Bribery Cases also provides detailed guidance on cooperation in foreign bribery cases.[70] In addition, the Group of 20 has

[64] See http://carin-network.org/.

[65] See http://carin-network.org/other-information.

[66] See www.norad.no/en/front/thematic-areas/democracy-and-good-governance/corruption-hunters/.

[67] See INTERPOL, "Tackling corruption requires collective response, INTERPOL Chief tells international summit" (12 May 2016). Available from www.interpol.int/en/News-and-media/News/2016/N2016-060/; see also www.gov.uk/government/news/pm-announces-new-plan-at-anti-corruption-summit-to-recover-stolen-assets.

[68] See http://star.worldbank.org/star/ArabForum/asset-recovery-guides.

[69] See World Bank and UNODC, *Asset Recovery Handbook: A Guide for Practitioners* (Washington, D.C., 2011). Available from https://star.worldbank.org/star/sites/star/files/asset_recovery_handbook_0.pdf.

[70] See OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (Paris, 2012). Available from http://www.oecd.org/daf/anti-bribery/TypologyMLA2012.pdf.

elaborated a set of High-Level Principles on Mutual Legal Assistance, which detail the basic practices for cross-border cooperation in foreign bribery cases.[71]

80. Many information exchange platforms also exist to facilitate cross-border cooperation. For instance, The INTERPOL Secure Communications for Asset Recovery system provides an encrypted channel to allow law enforcement officers in its Global Focal Point Network on Asset Recovery to exchange sensitive data during investigations.[72] The Financial Action Task Force of Latin America has also developed a secure platform to exchange information as part of its Asset Recovery Network.[73]

81. These networks and tools have been successfully used by law enforcement in numerous cross-border cases. For example, connections made through several networks, including the Corruption Hunters Network, facilitated the trust needed for Brazilian, French and Swiss authorities to cooperate in investigating and prosecuting the French firm Alstom for bribing officials in Brazil to win a contract to supply electrical equipment for the São Paulo power company.[74] Information provided by law enforcement in France and Switzerland, including evidence of large deposits in Swiss bank accounts related to the bribery, led to a settlement of R$60 million paid by the firm.

82. Parallel investigations and prosecutions in the Brazil, Switzerland and United States recently led to what was described as the largest-ever global foreign bribery resolution in history.[75] Through significant cooperation between the three States, investigators uncovered a massive bribery scheme conducted by Odebrecht S.A. and Braskem S.A. to win contracts in Latin America and Africa. The two companies pled guilty to the charge of conspiracy to bribe foreign officials and agreed to pay at least $3.5 billion in penalties, which was shared among the Governments of the three countries.

83. Through the use of mutual legal assistance, the United States Department of Justice and Nigerian Economics and Financial Crimes Commission successfully prosecuted multiple cases against companies trying to bribe officials of the Government of Nigeria. In 2008, Willbros Group Inc. and its subsidiary, Willbros International Inc., agreed to pay $22 million in criminal penalties relating to a bribe paid in Nigeria to secure rights to a pipeline project.[76] In addition, in 2010, the Department of Justice and the Commission conducted parallel investigations into a consortium of four companies, including Kellogg Brown & Root LLC, that had allegedly bribed Nigerian officials to win contracts for natural gas projects in Nigeria.[77] Significant cooperation between the two countries, and by authorities in France, Italy, Switzerland and the United Kingdom, ultimately led to the United States and Nigeria receiving $1.5 billion and $126 million, respectively, in fines and disgorgement.[78]

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[71] See www.oecd.org/g20/topics/anti-corruption/High-Level-Principles-on-Mutual-Legal-Assistance.pdf.

[72] See www.interpol.int/Crime-areas/Corruption/International-asset-recovery.

[73] See www.gafilat.org/content/cooperacion/#1 (Spanish only).

[74] See R. Messic, "Furthering Cross-Border Cooperation to Fight Corruption" (2015), available from https://globalanticorruptionblog.com/2015/12/23/furthering-cross-border-cooperation-to-fight-corruption/, and A. Fontana, "Transforming Brazil's anti-corruption record — Interview with Dr. Silvio Antonio Marques" (2017), available from www.cmi.no/publications/6155-transforming-brazils-anti-corruption-record.

[75] See United States Department of Justice, "Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History" (21 December 2016). Available from www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[76] See United States Department of Justice, "Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay $22 Million Penalty for FCPA Violations" (14 May 2008). Available from www.justice.gov/archive/opa/pr/2008/May/08_crm_417.html.

[77] See J. Holtmeier, "Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities", *Fordham Law Review*, Vol. 84, Iss. 2 (2015), pp. 493 and 498-99. Available from http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5143&context=flr.

[78] Ibid. See also United States Department of Justice, "Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine" (11 February 2009).

84. Successful prosecutions have also resulted from cooperation between the World Bank Integrity Vice Presidency and national authorities. For instance, in 2011, the Norwegian National Authority for the Investigation and Prosecution of Economic and Environmental Crime successfully prosecuted three employees of the Norwegian firm Norconsult after the Integrity Vice Presidency referred findings from its own investigation into the company's bribery to win a contract for a World Bank-financed water supply and sanitation project in the United Republic of Tanzania.[79]

85. The above cases show how successful States can be when they cooperate to investigate and prosecute cross-border offences. Through a mixture of multilateral networks, parallel investigations and formal and informal cooperation, and by working with multilateral institutions, States have secured massive penalties from companies for their overseas bribery.

V. Conclusions and recommendations

A. Conclusions

86. **As the present report indicates, when States identify a key harm that implicates the private sector, they are able to successfully develop processes and legal frameworks to promote cross-border law enforcement. Upon agreeing that certain cross-border harms, such as trafficking in persons, toxic dumping, wildlife and forestry crime, bribery and corruption, are global problems that require a coordinated global response, States develop and utilize innovative tools to foster effective cross-border cooperation. Each of those crimes affects human rights, and the Working Group applauds those efforts by States that have prevented, detected and punished violations committed by legal or natural persons. Law enforcement still faces many obstacles in pursuing cross-border cooperation in the areas outlined above, but our research and consultations revealed that States are working to continuously refine and improve their methods of cooperation, which demonstrates a willingness to find solutions.**

87. **However, despite numerous allegations implicating business in classic human rights violations and international crimes, investigations and prosecutions against companies are almost non-existent.**

88. **Thus, as a key principle, cross-border, business-related human rights abuses amount to international crimes, those cases should be prioritized and treated the same as other international criminal cases and States should use the existing tools at their disposal, including war crimes units.**

89. **To the extent that cases involving business-related human rights abuse might intersect with the types of crimes or regulatory offences outlined in the report, prosecutors should also pursue these charges. For instance, if a company that is alleged to have engaged in a human rights offence has also paid a bribe, a prosecutor might pursue a corruption claim.**

90. **However, such a patchwork approach will inevitably leave some human rights harms unaddressed. Law enforcement should explore all potential legal avenues available when faced with cross-border harms committed by economic actors, including by framing the harms in terms of domestic criminal or administrative offences.[80] This involves translating what may be labelled a human rights abuse as a**

Available from www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million.

[79] See World Bank, "World Bank Welcomes Norwegian Convictions of Three Former Employees of Norwegian Company Norconsult in Bribery Case in Tanzania" (22 July 2011). Available from www.worldbank.org/en/news/press-release/2011/07/22/world-bank-welcomes-norwegian-convictions-former-employees-norwegian-company-norconsult-bribery-case-tanzania.

[80] See "Corporate Crimes Principles" (footnote 3 above), pp. 42-43.

domestic offence — for example, forced labour can also constitute false imprisonment, and crimes against humanity can involve offences such as murder and assault. However, in all cases, any charges should reflect the gravity of the offence; thus, prosecutors should consider any human rights impacts of the crime when deciding the charges to be brought against an economic actor.

91. States are thus urged to collaboratively investigate and prosecute all cases where economic actors engage in conduct adversely impacting internationally recognized human rights to the extent that such harms arise from prohibited conduct within a national jurisdiction.

92. To investigate and prosecute these charges properly, States should apply the tools and methods discussed above, either directly or by analogy, to facilitate cooperation. Such means, as discussed in the guidance from the Accountability and Remedy Project and elaborated upon in the present report, have proved to generate effective results in cross-border cases. The recommendations below briefly recount those practices.

B. Recommendations

93. States should adopt a legal framework that prohibits conduct causing or contributing to human rights violations and imposes liability on legal entities. Moreover, States are encouraged to ratify bilateral and multilateral agreements that provide a basis for cross-border cooperation and to ensure that their domestic law allows for cooperation to take place.

94. Specialized investigative and prosecutorial units should be created that have expertise in cross-border human rights cases and business associations. If war crimes or other types of units already exist, those units should be encouraged to address business-related human rights cases alongside those involving individual wrongdoers.

95. A central authority should be established to channel all requests for cross-border assistance made under different treaty regimes and other legal bases. This authority should be accessible at all times, provide contact information for domestic and foreign authorities and be staffed by mutual legal assistance specialists who are knowledgeable about procedural requirements and can work in several languages. A system should be in place that tracks the status of requests, prioritizes urgent appeals, and ensures that deadlines are met.

96. States should encourage authorities to cooperate and provide training on sending and receiving requests for assistance. Requests for mutual legal assistance should include relevant contact information, details on evidence admissibility requirements, and any confidentiality and timeline requirements. Before rejecting any requests, consultations should be had with the requesting State to try to overcome any issues.

97. Informal cooperation should be used to obtain publicly available information or other evidence that does not require coercive means by investigators. Such officer-to-officer communication can help target subsequent requests for mutual legal assistance or accelerate responses to urgent formal requests.

98. If possible, States should consider conducting investigations in foreign jurisdictions if consent can be obtained. Law enforcement agencies are particularly encouraged to establish joint investigation teams using agreements covering all aspects of investigation, including division of labour and budgetary matters. Parallel investigations and joint centres of investigation should also be coordinated to minimize duplication of work and maximize efficiency.

99. States are encouraged to join, support and work with regional and international networks that promote cooperation and coordinate cross-border actions. These networks can operate well when they are informal, in that they serve to build relationships without requiring the creation of a new institution.

100. **States are also encouraged to, as appropriate, provide technical assistance and resources to States that may not have the institutional capacity for cross-border investigations. The use of networks and organizations such as INTERPOL allow for effective resource sharing to overcome an individual State's lack of resources.**

101. **Law enforcement agents should learn which online tools (in particular information sharing networks) are available to them and support their use. These databases and communication tools have proven to be indispensable in cross-border cases.**

102. **States are encouraged to be receptive to and cooperate with civil society organizations that help investigate cross-border cases. Civil society organizations are often able to amass detailed dossiers on cases by using innovative methods, conducting investigations in remote places where law enforcement may be unable to go, and gaining the trust of certain witnesses. At the same time, those organizations should take care to meet admissibility standards when collecting evidence and be careful not to jeopardize official investigations, for instance by publicizing matters prematurely. When organizations are instrumental in bringing cases, law enforcement should consider maintaining a relationship with these organizations once official investigations are under way, as the organizations could be helpful in obtaining further evidence. States should also consider ways to better train organizations with identifying crimes and securing evidence.**

103. **In any investigation or prosecution, all actors must ensure that the rights of every person are respected and protected. Protections and care should be extended to victims, witnesses and whistle-blowers to ensure no added harm occurs. Furthermore, suspects should never be deprived of essential rights, particularly those relating to the fair administration of justice.**